EDITOR'S NOTE

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85-972

Title: Robert L. Clarke, Comptroller of the Currency, Petitioner
v.
Securities Industry Association

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Weidner, James B.

try	Date	Note	Proceedings and Orders
1	Sep 30 1985		Application for extension of time to file petition and order granting same until November 9, 1985 (Chief Justice, October 1, 1985).
2	Oct 30 1985		Application for further extension of time to file petition and order granting same until December 9, 1985 (Chief Justice, November 1, 1985).
3	Dec 9 1985	G	Petition for writ of certiorari filed.
5	Dec 23 1985		Order extending time to file response to petition until February 8, 1986.
6	Jan 10 1986		Brief amicus curiae of American Bankers Assn. filed. VIDED.
7	Feb 8 1986		Brief of respondent Securities Indus. Assn. in opposition filed. VIDED.
8	Feb 9 1986		Brief amicus curiae of NY Clearing House Assn. filed. VIDED.
9	Feb 12 1986		DISTRIBUTED. February 28, 1986
0	Feb 12 1986		REDISTRIBUTED. February 28, 1986
1	Mar 3 1986		Petition GRANTED. The case is consolidated with 85-972, and a total of one hour is allotted for oral argument.
			**********
3	Apr 14 1986		Order extending time to file brief of petitioner on the merits until May 17, 1986.
4	Apr 23 1986		Record filed.
5	Apr 23 1986		Certified copy of original record and C. A. proceedings received.
6	May 16 1986		Brief amicus curiae of American Bankers Assn. filed. VIDED.
7	May 16 1986		Brief amicus curiae of Consumer Bankers Assn. filed. VIDED.
8	May 16 1986		Brief of petitioner Security Pacific Natl. Bank filed. VIDED.
9	May 19 1986	G	Motion of Legal Foundation of America for leave to file a brief as amicus curiae filed.
0	May 16 1986		Brief amicus curiae of NY Clearing House Assn. filed. VIDED.
1	May 16 1986	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
2	Jun 2 1986		Motion of Legal Foundation of America for leave to file a brief as amicus curiae GRANTED.
3	Jun 2 1986		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
4	Jun 2 1986		Brief of petitioner Clarke, Comptroller filed. VIDED.
6	Jun 12 1986		Order extending time to file brief of respondent on the merits until July 23, 1986.

). 85-971-CFX

itry	Date	Note	Proceedings and Orders
17	Jul 23 1986		Brief amicus curiae of Branch Banking and Trust Co., et al. filed. VIDED.
18	Jul 23 1986		Brief amicus curiae of Independent Bankers Assn. of America filed. VIDED.
19	Jul 23 1986		Brief of respondent Securities Indus. Assn. filed. VIDED.
10	Jul 31 1986	G	Motion of the Solicitor General for divided argument filed.
21	Sep 12 1986		CIRCULATED.
22	Sep 24 1986		Motion of the Solicitor General for divided argument GRANTED.
23	Sep 3 1986		SET FOR ARGUMENT. Monday, November 3, 1986. This case is consolidated with No. 85-972. (4th case) (1 hour)
24	Oct 27 1986	X	Reply brief of petitioner Clarke, Comptroller filed. VIDED.
25	Oct 27 1986	X	Reply brief of petitioner filed. VIDED.
26	Nov 3 1986		ARGUED.

No. 85-971

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

EUGENE M. KATZ
MARK L. LEEMON
Attorneys

Office of the Comptroller of the Currency
Washington, D.C. 20219

ANTHONY J. STEINMEYER
NICHOLAS S. ZEPPOS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether offices of national banks that offer only discount brokerage services are "branches" within the meaning of Section 7(f) of the McFadden Act, 12 U.S.C. 36(f).

2. Whether an association of securities brokers, underwriters, and investment bankers has standing to challenge the application of the McFadden Act's branching limitations to national banks.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 758 F.2d 739. The order and opinion of the court of appeals respecting denial of the suggestion for rehearing en banc (App., *infra*, 4a-9a) is reported at 765 F.2d 1196. The opinion of the district court (App., *infra*, 10a-29a) is reported at 577 F. Supp. 252.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 48a-49a) was entered on April 12, 1985. A petition for rehearing was denied on July 12, 1985 (App.,

infra, 4a-9a). On October 1, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 9, 1985. On November 1, 1985, the Chief Justice further extended the time for filing to and including December 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 36(c) provides:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on ~~State~~ banks.

12 U.S.C. 36(f) provides:

> The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. 81 provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

STATEMENT

1. Section 7(c) of the McFadden Act (the Act) (12 U.S.C. 36(c)) authorizes any national bank to establish branch offices in the state in which it is located. It may only do so, however, to the extent that "such establishment and operation are at the time authorized to State banks by the statute law of the State in question." 12 U.S.C. 36(c)(2). See generally *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 253 (1966).[1] By its terms, this geographical limitation applies only to the operation of national bank "branches," which are defined by Section 7(f) of the Act (12 U.S.C. 36(f)) "to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

b. In 1982, two national banks, Union Planters National Bank of Memphis (Union Planters) and Security Pacific National Bank of Los Angeles (Security Pacific), applied to the Comptroller of the Currency for permission to open offices that would

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[1] In addition, national banks may branch within their home city "if such establishment and operation [of branches] are at the time expressly authorized to State banks by the law of the State in question." 12 U.S.C. 36(c)(1).

offer discount brokerage services to the public.[2] Security Pacific's application stated that these services initially would be offered at Security Pacific's established branch offices throughout California, and eventually would be provided at nonbranch offices in California and other states. App., *infra*, 11a. Union Planters' application stated that it planned to acquire Brenner Steed & Associates, Inc. (Brenner Steed), an existing discount brokerage firm, and that it intended to offer Brenner Steed's services at selected Union Planters branches in Tennessee, as well as at locations in six other states. *Id.* at 10a-11a.

On August 26, 1982, the Comptroller approved Security Pacific's application, concluding that bank offices offering only discount brokerage services are not "branches" within the meaning of the Act, and therefore are not subject to the Act's geographical restrictions on the locations where national bank offices may operate.[3] The Comptroller first noted that the term "branch" is "statutorily defined to include" any place " 'at which deposits are received, or checks paid, or money lent.' " App., *infra*, 39a, quoting 12 U.S.C. 36(f). He then determined that Security Pacific's discount brokerage offices would not receive deposits, pay checks, or make loans (App., *infra*.,

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[2] Discount brokers execute trades on behalf of their customers but do not offer investment advice. As a result, the commissions they charge are substantially lower than those charged by full-service brokers. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2.

[3] The Comptroller also found that Security Pacific's provision of discount brokerage services was not barred by the Glass-Steagall Act (12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378). App., *infra*, 31a-39a.

39a-43a), and thus would not fall within the statutory definition.

Although this conclusion sufficed to establish that the operation of discount brokerage offices away from chartered branches would not run afoul of the Act, the Comptroller went on to address the question whether those offices nevertheless "could be found by a court to be branches within the meaning of the McFadden Act" under *any* reading of the statute (App., *infra*, 43a). He concluded that they could not. Even if the Act were read to provide that some bank offices that do not perform any of the three services enumerated in Section 36(f) are branches, the Comptroller explained, those services "should at the very least" involve "dealings with the public requiring a specialized banking or similar license" (App., *infra*, 43a-44a). Discount brokerage operations do not fall into this category. Indeed, the Comptroller explained that it would be inconsistent with settled practice in the banking industry to find that securities brokerage activities constitute a branch banking function, because a substantial "number of banks currently operat[e] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra-state and interstate basis." *Id.* at 45a.[4]

2. In response to the Comptroller's decisions, respondent, a trade association representing securities brokers, underwriters, and investment bankers (see App., *infra*, 10a), brought this action in United States District Court for the District of Columbia.

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[4] Shortly after issuing this opinion, the Comptroller approved without comment Union Planters' application to acquire Brenner Steed (App., *infra*, 47a).

Among other things,[5] respondent contended that bank discount brokerage offices are branches within the meaning of Section 36(f) and thus are subject to the geographical restrictions imposed by Section 36(c). Respondent therefore argued that discount brokerage services may be offered by national banks only at their central offices or at licensed branches.

In relevant part, the district court ruled for respondent. The court first held that respondent had standing to challenge the Comptroller's implementation of the Act. Although the court acknowledged that the Act was passed "to equalize competition between state and national banks" (App., *infra*, 20a), it nevertheless held that respondent's claim fell "within the zone of interests protected by the McFadden Act" (*id.* at 23a).[6] Relying on *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970) and *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), which had held that bank competitors may challenge the implementation of the Bank Service Corporation Act (12 U.S.C. 1861-1867), the district court reasoned that there is no need for "any explicit expression in the statute or its legislative history for the court to find that [respondent] is within the [Act's] zone of interests" (App., *infra*, 23a). And the court found that the Act, read in conjunction

[5] Respondent also contended that the Glass-Steagall Act *entirely* prohibits national banks from offering discount brokerage services (see note 3, *supra*). This contention was rejected by the district court (App., *infra*, 13a-20a).

[6] The court also found that respondent had demonstrated that it will suffer actual harm from the Comptroller's ruling because respondent "alleged that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them" (App., *infra*, 23a).

with the National Bank Act of 1864, "evince[d] the intent of Congress to curb the scope of national banks' activities" (App., *infra*, 24a). If national banks succeed in avoiding these curbs, the court held, respondent's members will be injured "just as" the bank competitors in *Arnold Tours* and *Data Processing Organizations* had been harmed.

On the merits, the district court—while acknowledging that the Comptroller's views are entitled to deference (App., *infra*, 25a)—rejected the Comptroller's argument that the Act's branching restrictions apply only to offices that perform at least one of the three activities enumerated in the statutory definition. The court noted that Representative McFadden, in post-enactment remarks, described the term "branch" to include a bank office that "transact[s] any business carried on at the main [bank] office" (*id.* at 26a, quoting 68 Cong. Rec. 5816 (1927) (emphasis omitted)). And the district court read this Court's holding in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), as requiring "a broader, more flexible interpretation * * * of the statute than that followed by the Comptroller" (App., *infra*, 26a). The district court therefore ruled that the "brokerage business * * * is within the category of 'general business' which national banks may conduct at their main office and, as such, is subject to the branching restrictions" (*id.* at 28a). The court accordingly invalidated the Comptroller's ruling to the extent that it permitted Union Planters and Security Pacific to offer discount brokerage services at nonbranch locations.

In a brief per curiam opinion, the court of appeals affirmed the district court's ruling, "generally for the reasons stated" by the district court (App., *infra*,

2a). Judge Scalia dissented from the McFadden Act aspect of this holding,[7] arguing that the district court had "conflate[d] the constitutional requirement of injury in fact and the separate requirement that 'Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute'" (App., *infra*, 3a, quoting *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984)). In Judge Scalia's view, only "state banks and possibly federal banks" are within that zone (App., *infra*, 3a). He therefore would have dismissed respondent's claims under the Act for lack of jurisdiction.

The Comptroller's petition for rehearing en banc[8] was denied (App., *infra*, 4a-5a) over a dissent by Judge Scalia, joined by Judges Bork and Starr. Judge Scalia repeated his criticism of the court's holding on standing, finding it "uncontroverted that [the Act's] purpose was to establish competitive equality between state and federal banks * * *. Thus, state banks (and state banking commissions) are obviously within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are busi-

[7] The court of appeals unanimously affirmed the district court's holding that the Glass-Steagall Act does not prohibit national banks from offering discount brokerage services, noting that the district court's ruling on this point was bolstered by *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984) (App., *infra*, 28a). The Glass-Steagall Act aspect of the holding below is challenged by respondent's pending petition for a writ of certiorari, No. 85-392.

[8] Security Pacific intervened and filed its own petition for rehearing en banc.

nesses competing for the parking spaces that an unlawful branch may occupy" (App., *infra*, 6a). In these circumstances, Judge Scalia reasoned that the court's ruling "entirely reduces the 'zone of interest' inquiry under the McFadden Act to an inquiry into 'injury in fact'" (*id.* at 6a-7a).

Judge Scalia also took issue with the court's holding on the merits. He noted that discount brokerage services are not one of the activities enumerated in Section 36(f). And he found this Court's ruling in *Plant City*, which described the Section 36(f) definition as "'suggest[ing] a calculated indefiniteness'" (App., *infra*, 8a, quoting 396 U.S. at 135 (emphasis omitted)), to be "virtually dispositive *in favor of the Comptroller*" (App., *infra*, 8a (emphasis in in original)), since such a definition "presents precisely the situation in which [the court's] deference to the agency should be at its height" (*ibid.*).

REASONS FOR GRANTING THE PETITION

Despite the brevity of its opinion—and its failure to offer any reasons in support of its ruling—the court of appeals' McFadden Act holding will have an immediate and substantial effect on the Nation's banking industry, as well as on competition in the offering of broker's services. In addition to the two involved in this case, the Comptroller currently is considering more than 60 applications from national banks for permission to engage in the discount brokerage business. Under the ruling below, the Comptroller will be required to deny these applicants permission to conduct discount brokerage operations away from licensed bank branches. Because discount brokers charge low commissions and depend for their profits on a high volume of business (cf. *Securities*

Industry Ass'n v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2; App., *infra*, 11a), the court of appeals' holding raises substantial practical barriers to the ability of national banks to compete with brokerage houses that are not subject to geographical limitations. And given the increasing competition in the financial services industry (see, *e.g.*, J. Hawke, *Commentaries on Banking Regulation* 245-279 (1985)), this development is of considerable significance to national banks.

The court of appeals' ruling also creates anomalous and disruptive distinctions *within* the banking industry. Under this Court's decision in *Securities Industry Ass'n* v. *Board of Governors*, *supra*, bank holding companies may offer discount brokerage services that are not subject to geographic restrictions.[9] But that ruling cannot benefit the smaller and medium-sized national banks that are not affiliated with holding companies—and which are thus doubly disadvantaged by the decision below.[10]

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[9] Brokerage businesses owned by holding companies may be operated on a nationwide basis: those businesses are not "banks" under the Bank Holding Company Act (see 12 U.S.C. 1841(c)), and thus are not subject to the limitations on interstate banking operations imposed by that Act. 12 U.S.C. 1842(c); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47-48 & n.13 (1980). See generally *Northeast Bancorp, Inc.* v. *Board of Governors*, No. 84-363 (Apr. 15, 1985), slip op. 2.

[10] Even bank holding companies that are permitted to operate discount brokerage businesses as nonbanking subsidiaries (rather than as wholly owned subsidiaries of a national bank) do so at a disadvantage; while bank subsidiaries may be funded with bank funds, holding company subsidiaries may not be funded in that manner. Thus Security Pacific, although owned by a holding company, in this case is seeking

The importance of the court of appeals' decision is compounded by what can be expected to be its nationwide effect. The Comptroller may always be sued in the District of Columbia. See 28 U.S.C. 1391(e). And given the precedent established by the decision below (as well as the vigilance of respondent in protecting its members' interests), it is unlikely that a conflict in the circuits ever will develop on the question presented here. Indeed, after this action was filed, respondent brought another suit in the United States District Court for the District of Columbia that challenges, among other things, the Comptroller's decision to permit a national bank to offer brokerage and investment advice services at nonbranch locations. *Securities Industry Ass'n* v. *Conover*, No. 83-3581 (D.D.C.).[11] In these circumstances, review of the decision below plainly is warranted.

1. a. Although the court of appeals' holding that discount brokerage services may be offered by national banks only at chartered branches will have a substantial and immediate effect on the banking industry, that ruling cannot be reconciled with the Act. Section 36(f) (emphasis added) specifically defines the term "branch * * * to include any branch bank, branch office, branch agency, additional office or any branch place of business * * * at which *deposits are received, or checks paid, or money lent.*" As the Comptroller explained in detail (App., *infra*, 39a-43a), discount brokerage offices perform none of these functions—and therefore cannot be deemed branches.

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permission to operate its brokerage business as a banking subsidiary.

[11] The district court has stayed proceedings in that case pending disposition of the certiorari petitions filed here.

Because the statute uses the word "include," the courts below evidently reasoned that the three enumerated functions that characterize a branch—receiving deposits, paying checks, and making loans—were intended by Congress only to be illustrative (see App., *infra*, 26a-27a). Given the structure of the statutory definition, however, the approach taken below plainly is a misreading of Section 36(f): "[t]he term 'include * * * does not relate to the activities involved but refers to the *places* at which the specified activities of receiving deposits, paying checks and lending money are carried out. The places may include branch banks, branch offices, branch agencies, additional offices, mobile trucks, [and] electronic devices." *Continental Illinois National Bank* v. *Illinois ex rel. Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976), slip op. 17-18 (emphasis added) (reprinted in Gov't C.A. Br. Addendum C). The statutory language thus should have been dispositive.

b. The courts below nevertheless reasoned that the Act's legislative history justified their refusal to apply a "literal reading of the statute" (App., *infra*, 25a). In fact, however, the legislative background, to the extent that it sheds any light at all on the issue here, supports the conclusion that bank offices are subject to the Act's branching restrictions only when they perform one of the three functions enumerated in Section 36(f). During debate on the Act, both proponents and opponents of branch banking expressed concern that national banks might obtain monopoly control over capital and credit, thus driving smaller state banks out of business. See, *e.g.*, 66 Cong. Rec. 1628-1629 (1925) (remarks of Rep. Stevenson); *id.* at 1633 (remarks of Rep. Williams); *id.* at 4437 (remarks of Sen. Reed). It is,

of course, through the receiving of deposits, cashing of checks, and making of loans that the money supply and credit are controlled; not surprisingly, then, the congressional discussion about the appropriate scope of restrictions on branching referred only to bank offices that performed these functions. See, *e.g.*, 66 Cong. Rec. 1628 (1925) (remarks of Rep. Stevenson); *id.* at 1633 (remarks of Rep. Williams); *id.* at 4433 (remarks of Sen. Shipstead); *id.* at 4527 (remarks of Sen. Heflin).[12]

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[12] The district court's analysis of the legislative history was limited to consideration of a single post-enactment statement by Rep. McFadden, to the effect that "'[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at its main office* is a branch * * *'" (App., *infra*, 26a, quoting 68 Cong. Rec. 5816 (1927) (remarks of Rep. McFadden) (emphasis added by the court)). But the district court's reliance on this statement —which was inserted into the record 10 days after passage of the Act, while Congress was in adjournment—disregarded this Court's "oft-repeated warning that [post-enactment statements] form a hazardous basis for inferring" the intent of Congress. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 823 (1980). And there are especially compelling reasons here to be skeptical of Representative McFadden's statement. While the branching statute bears his name, Representative McFadden was in fact a fervent opponent of branch banking, who would have required state banks to relinquish statewide branches and imposed significant limitations on branching by national banks. See 67 Cong. Rec. 2829, 2832 (1926) (remarks of Rep. McFadden). He thus had a clear interest in adding to the legislative record a broad definition of "branch." Indeed,

At the same time, the legislative background makes plain that the omission of brokerage operations from the functions enumerated in Section 36(f) could not have been an oversight. At the time of the Act's enactment in 1927, "[i]t [was] a matter of common knowledge that national banks [had] been engaged in the investment-securities business * * * for a number of years." H.R. Rep. 83, 69th Cong., 1st Sess. 2 (1926); see 66 Cong. Rec. 1585-1586 (1925) (remarks of Rep. McFadden). Congress also was aware that these securities activities were conducted "to a very large extent throughout the country." 67 Cong. Rec. 8351 (1926) (remarks of Sen. Pepper). Indeed, in the same legislative package in which it defined the term "branch," Congress specifically authorized national banks to buy and sell investment securities. See ch. 191, § 2, 44 Stat. 1226; S. Rep. 473, 69th Cong., 1st Sess. 7 (1926). Had Congress intended these activities to be carried out only at chartered branches, it presumably would have said so. Cf. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716, 721 (8th Cir. 1976) (Henley, J., dissenting), cert. denied, 433 U.S. 909 (1977).

c. The courts below also felt free to disregard the Comptroller's construction of Section 36(f) because they found it inconsistent with this Court's statement in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (see App., *infra*, 26a-27a) that

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Rep. McFadden's post-enactment remarks primarily demonstrate how easy it would have been for Congress to have adopted an all-encompassing definition of branch had it wished to do so.

> [a]lthough the definition [in Section 36(f)] may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term 'branch'; by use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135; emphasis in original. The Court in *Plant City* then held that two off-premises banking services owned and operated by a national bank—an armored car messenger service that received cash and checks for deposit and a stationary receptacle for customer deposits (see *id.* at 125-129)—were branches within the meaning of Section 36(f) because they "received * * * deposit[s]" (*id.* at 137).

On close examination, it is plain that the Comptroller's analysis here is entirely consistent with *Plant City*. To the extent that the language quoted above leaves open the possibility that branches may include bank offices that do not perform one of the three enumerated functions, the Court expressly declined to resolve the issue; its opinion was explicitly "confine[d] * * * to the question of whether deposits were received" at the challenged off-premises facilities (396 U.S. at 135). Indeed, if the Court had meant to hold that *all* bank offices are branches, its extensive consideration of the question whether the facilities at issue received deposits would have been unnecessary. See *id.* at 135-138.

Insofar as the *Plant City* dictum is relevant at all, then, it should be deemed "virtually dispositive in

favor of the Comptroller" (App., *infra*, 8a (Scalia, J., dissenting) (emphasis omitted)). As Judge Scalia noted, a statute "containing a 'calculated indefiniteness' presents precisely the situation in which [a court's] deference to the agency should be at its height" (*ibid.*). See generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5-7; *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 56 & n.21 (1981). And the "Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness—or indeed that the range includes *only* the enumerated functions—cannot by any means be considered unreasonable" (App., *infra*, 8a-9a (emphasis in original)).

The deference due the Comptroller is reinforced by the fact that the court of appeals' novel reading of the statute would disrupt long-settled practice in the banking industry. For many years, the Comptroller has permitted national banks to operate loan production offices, government and municipal securities offices, trust offices, and similar operations—which do not carry on any of the three functions enumerated in Section 36(f)—on an interstate basis, without regard to the Act's branching limitations. See App., *infra*, 44a. See generally 12 C.F.R. 7.7380; Whitehead, *Regional Forces for Interstate Banking*, Fed. Res. Bank of Atlanta Economic Review 4 (May 1983). The decisions below cannot be reconciled with this established practice. In these circumstances, "the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons' " of a sort that plainly have not been

advanced here. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978), quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921). Cf. *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 21-22.

d. Finally, even if the three functions enumerated in Section 36(f) are not the only ones that characterize branches, the courts below erred in holding that *all* operations undertaken by banks—including *non-banking* operations such as discount brokerage—must be conducted at branches. The three functions enumerated in Section 36(f), if not wholly dispositive, must have at least some bearing on the definition of the term "branch"; their inclusion in the statute otherwise would have been wholly superfluous.[13] And what those functions have in common, of course, is each one's status as a "basic bank[ing] service[]" (*Plant City*, 396 U.S. at 137). As a result, courts have characterized the test of a branch as whether the office at issue performs "routine bank-

[13] The district court thus erred in suggesting (App., *infra*, 28a) that 12 U.S.C. 81—which provides that "[t]he general business of each national banking association shall be transacted in [its main office] and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title"—confines all aspects of a bank's business to its main office or its branches. Such a reading renders Section 36(f) superfluous, and disregards Section 81's incorporation by reference of Section 36. In fact, Section 81 simply limits the places at which a bank may carry on its "general business," rather than the places at which it may conduct any of its business. See *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87-88 (1911) (the "cases clearly indicate * * * a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business").

ing function[s]" (*Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 178 (7th Cir.), cert. denied, 429 U.S. 871 (1976)) or "traditional banking transaction[s]." *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977). See also *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 943 (D.C. Cir.), cert. denied 429 U.S. 862 (1976). Against this background, as the Comptroller explained, even the broadest reading of Section 36(f) must "at the very least be limited to those dealings with the public requiring a specialized banking or similar license" (App., *infra*, 43a-44a).[14]

This distinction between basic bank services and the more peripheral activities that are performed by banks has been recognized in other contexts by Congress and the Court. In 12 U.S.C. (Supp. II) 24 Seventh, for example, Congress specifically defined the "business of banking" to include "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * * receiving deposits;

[14] Although several courts have used broad language in describing the definition of "branch," to our knowledge only one court has held that a bank office performing a function other than one of the three enumerated in Section 36(f) is a branch. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), cert. denied, 433 U.S. 909 (1977). In *St. Louis County National Bank*, a divided panel of the Eighth Circuit held that bank trust offices are subject to branching restrictions. While we believe that this decision was incorrect, it has an arguable basis in the fact that trust offices—unlike discount brokerage offices—do require the issuance of a special banking license from the Comptroller. See 12 U.S.C. 92a; 548 F.2d at 719-720.

* * * buying and selling exchange, coin, and bullion; * * * loaning money on personal security; and * * * obtaining, issuing, and circulating notes." The brokerage business is not included on this list of traditional bank activities. To the contrary, the next sentence of 12 U.S.C. (Supp II) 24 Seventh authorizes national banks to undertake, to a limited extent, the "business of dealing in securities and stock." Similarly, this Court has upheld the right of bank holding companies to acquire discount brokerage firms under the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*) because discount brokerage is a "*nonbanking* activity 'closely related to banking.'" *Securities Industry Ass'n* v. *Board of Governors*, slip op. 2, quoting 12 U.S.C. 1843(c)(8) (emphasis added). Cf. *Merchants' Bank* v. *State Bank*, 77 U.S. 604, 651 (1871); *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87-88 (1911).

There is thus little doubt that discount brokerage is not a traditional banking service. It could not seriously be suggested, for example, that Brenner Steed prior to its acquisition by Union Planters—or, for that matter, that respondent's members—engaged in the banking business by offering brokerage services. And the character of Brenner Steed's operations was not altered by the acquisition. In these circumstances, the Comptroller's careful distinction between traditional bank services and discount brokerage operations (App., *infra*, 43a-44a) should have been respected by the courts below.

2. The courts below also erred for a second, independent reason, in holding that respondent has standing to challenge the Comptroller's decision. While respondent may have suffered injury in fact (see App., *infra*, 23a), its claim plainly does not "fall within 'the zone of interests to be protected or regu-

lated by the statute * * * in question.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982), quoting *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). And as this Court repeatedly has explained, satisfaction of the zone of interests requirement is a prerequisite to standing.[15]

It is beyond dispute that the enactment of the Act "was a response to the competitive tensions inherent in a dual banking structure where state and national banks coexist in the same area," and was designed to guarantee "that neither system have advantages over the other in the use of branch banking." *Plant City*, 396 U.S. at 131. Prior to passage of the Act in 1927, national banks were prohibited from establishing branches. See *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966); *First National Bank* v. *Missouri*, 263 U.S. 640, 656 (1924). State banks, however, could branch as permitted by the laws of the individual states, a situation that placed national banks at a "considerable disadvantage." H.R. Rep. 83, 69th Cong., 1st Sess. 6 (1926). See *Walker Bank*, 385 U.S. at 257; 66 Cong.

[15] See *Allen* v. *Wright*, No. 81-757 (July 3, 1984); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

Rec. 1646 (1925) (remarks of Rep. McFadden). By allowing national banks to branch, the Act thus "protect[ed] national banks from the unrestrained branch bank competition of state banks." *Plant City*, 396 U.S. at 131; see *Walker Bank*, 385 U.S. at 257-258. At the same time, Congress protected state banks by permitting national banks to branch only "in those cities where State banks are allowed to have [branches] under State laws" (H.R. Rep. 83, *supra*, at 7). The Act thus adopted what Congress and this Court repeatedly have characterized as a policy of "competitive equality" between national and state banks. See *Plant City*, 396 U.S. at 131-134, 136, 138; *Walker Bank*, 385 U.S. at 258, 261.[16]

Against this background, the courts below relied on *Data Processing Organizations* and *Arnold Tours* to hold that respondent's claim falls within the zone of interests protected by the Act. But that reliance was misplaced. Those cases stand only for the proposition that, in the face of congressional silence about who is to benefit from given legislative action, the zone test is satisfied when "Congress ha[s] arguably legislated against the competition that the [plaintiff seeks] to challenge." *Investment Co. Institute*, 401 U.S. at 620. See *Arnold Tours*, 400 U.S. at 46; *Data Processing*

[16] As originally adopted, the Act permitted national banks to branch only in those cities where the bank had its main office. See 44 Stat. 1226. In 1933, Congress amended the Act to permit national banks (as well as state banks that were members of the Federal Reserve System) to branch statewide, if such branching was permitted to state banks by state law. See Ch. 89, § 23, 48 Stat. 189; *Walker Bank*, 385 U.S. at 259-260. This amendment "further strengthened the policy of competitive equality." *Plant City*, 396 U.S. at 132. See 77 Cong. Rec. 5896 (1933) (remarks of Rep. Luce).

Organizations, 397 U.S. at 155-156. Here, in contrast, there is no doubt that Congress had only one type of competitive injury in mind when it passed the Act—the type that national and state banks might inflict upon each other. Compare *Barlow* v. *Collins*, 397 U.S. 159, 164-165 (1970).[17] In such circumstances, there is no basis for inferring that Congress wished to afford other persons protection from the normal competition of the marketplace. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Instead, "[w]here Congress has * * * clearly defined the class to be protected, the zone test * * * prevent[s] groups outside of the class from usurping the legislative entitlement." *Leaf Tobacco Exporters Ass'n* v. *Block*, 749 F. 2d 1106, 1115 (4th Cir. 1984). See *Bank Stationers Ass'n* v. *Board of Governors*, 704 F.2d 1233, 1235-1236 (11th Cir. 1983); *In re Swearingen Aviation Corp.*, 605 F.2d 125, 127 (4th Cir. 1979); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759, 766 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977); Jaffe, *Standing Again*, 84 Harv. L. Rev. 634 (1971). It is thus the claims only of state and national banks that fall within the zone of interests protected by the Act. See App., *infra*, 3a, 6a (Scalia, J., dissenting).[18]

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[17] This case differs from *Data Processing Organizations* and *Arnold Tours* in another respect as well. Had the claims of the plaintiffs in either of those cases been held to be outside the zone of interests, judicial review of the agency action would have been effectively precluded. Here, in contrast, state banks (and perhaps other national banks) may challenge the Comptroller's national bank branching decisions.

[18] Respondent is not an appropriate party to advance the claims of state banks. See generally *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). And because no state bank challenged the Comptroller's action, the record below contains no evidence bearing on what, if any, competitive effect the Comptroller's decision will have on such banks. To the extent that respondent seeks to advance the interests of state banks, then, its claims do not arise "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Similarly, although respondent had standing to raise (see notes 5, 7, *supra*) its Glass-Steagall Act claim (see *Investment Co. Institute*, 401 U.S. at 620), it cannot " 'borrow' the arguable regulatory or protective intent embodied in one [statute], and apply it to a [statute] where that intent is not evident in order to satisfy the zone test." *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Cf. *Warth*, 422 U.S. at 500.

That the courts below reached a contrary conclusion is a consequence of what repeatedly has been characterized as "confusion and divergent approaches among lower federal courts" relating to the proper application of the zone test. *Copper & Brass Fabricators Council, Inc.* v. *Dep't of the Treasury*, 679 F.2d 951, 954 (D.C. Cir. 1982) (Ginsburg, J., concurring in the result). See *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1110; Note, *A Defense of the 'Zone of Interests' Standing Test*, 1983 Duke L.J. 447, 453-454. As the District of Columbia Circuit itself has recognized, " 'the most common pattern' " for courts to follow in zone of interest cases—and certainly the pattern that was followed below—" 'is to announce in conclusory terms that the zone standard has or has not been satisfied.' " *Copper & Brass Fabricators*, 679 F.2d at 954 (Ginsburg, J., concurring in the result), quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 139 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). This situation has prompted at least one appellate judge to suggest that "[c]larifi-

cation from the [Supreme] Court would facilitate the expeditious, even handed disposition of standing controversies by lower courts." *Copper & Brass Fabricators*, 679 F.2d at 955 (Ginsburg, J., concurring in the result). Given the clear error of the holding below, the Court might appropriately use this case to provide such clarification.[19]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

EUGENE M. KATZ
MARK L. LEEMON
Attorneys

Office of the Comptroller of the Currency

ANTHONY J. STEINMEYER
NICHOLAS S. ZEPPOS
Attorneys

DECEMBER 1985

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[19] In light, however, of the importance of dispelling the cloud cast by the decision below on widespread practices in the banking industry, the Court may wish to grant certiorari limited to the substantive McFadden Act issue. Respondent's failure to fit within the zone presents only a statutory question; there obviously is adequate adversity of interest in this case to satisfy the requirements of Article III of the Constitution.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, ET AL., APPELLANTS

No. 84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C. T. CONOVER, Comptroller of the Currency,
Office of the Comptroller of the Currency

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 82-02865)

Argued March 25, 1985

Decided April 12, 1985

Before WRIGHT, GINSBURG, and SCALIA, *Circuit Judges.*

Opinion for the court *per curiam.*

Opinion concurring in part and dissenting in part filed by *Circuit Judge* SCALIA.

PER CURIAM: This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Memorandum Opinion. *See Securities Industry Ass'n v. Comptroller of the Currency,* 577 F. Supp. 252 (D.D.C. 1983). We note also that the District Court's Glass-Steagall Act analysis receives substantial support from a Supreme Court opinion issued while these cases were pending on appeal. *See Securities Industry Ass'n v. Board of Gov. of FRS,* —— U.S. ——, 104 S.Ct. 3003 (1984).

Affirmed.

SCALIA, *Circuit Judge,* concurring in part and dissenting in part: I concur in the court's disposition with regard to the Glass-Steagall Act. Instead of affirming the District Court's resolution of the McFadden Act issue on the merits, I would vacate and remand with instructions to dismiss for lack of jurisdiction.

The District Court found that SIA had standing to challenge the Comptroller's ruling that discount brokerage offices operated by national banks are not subject to the locational restrictions of the McFadden Act and the National Banking Act because "attempts to exceed those curbs would harm SIA's members . . . ." *Securities Industry Ass'n v. Comptroller of the Currency,* 577 F.Supp. 252, 258-59 (D.D.C. 1983). This conflates the constitutional requirement of injury in fact and the separate requirement that "Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute." *Glass Packaging Institute v. Regan,* 737 F.2d 1083, 1090 (D.C. Cir. 1984). In my view, state banks and possibly federal banks, but not all businesses injured in fact, are within the zone of interests protected by the branch banking restrictions. *See, e.g., id.* at 1088-89; *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury,* 679 F.2d 951, 952-53 (D.C. Cir. 1982); *Tax Analysts and Advocates v. Blumenthal,* 566 F.2d 130, 138, 144-45 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, ET AL., APPELLANTS

No. 84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C. T. CONOVER, Comptroller of the Currency,
Office of the Comptroller of the Currency

On Suggestions for Rehearing *En Banc* of the
Comptroller of the Currency, filed May 28, 1985,
and Intervenor, Security Pacific National Bank,
filed June 12, 1985

Opinion Filed July 12, 1985

Before: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The suggestions for rehearing *en banc* of Security National Bank and the Comptroller of the Currency have been circulated to the full Court. A majority of the judges of the court in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam

Chief Judge Robinson and Circuit Judge Wald did not participate in this order.

A dissenting statement of Circuit Judge Scalia, joined by Circuit Judges Bork and Starr, is attached.

SCALIA, *Circuit Judge*, with whom *Circuit Judges* BORK and STARR join, dissenting: The panel opinion in this case upheld the judgment of the District Court, in a suit brought by an association of brokerage houses, that the Comptroller violated sections 7(c) and 8 of the McFadden Act, 12 U.S.C. §§ 36(c), 81 (1982), in permitting national banks to conduct discount brokerage operations at locations other than their main banking offices and authorized branches.

The McFadden Act restricts only the *location* and not (unlike the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.) (1982)) the *nature* of bank activities. It is uncontroverted that its purpose was to establish competitive equality between state and federal banks by authorizing branching by federally chartered banks to the same extent as permitted to state banks by state law. Thus, state banks (and state banking commissions) are obviously within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy.

More importantly, however, the District Court, whose reasoning was adopted by the panel opinion, did not, in my view, base its standing decision merely on this erroneous construction of the language and purpose of the McFadden Act. My reading of the District Court opinion is that the Securities Industry Association's members (1) would have standing to sue under the Glass-Steagall Act, which restricts the scope of activities that national banks can engage in, and (2) would be actually harmed by attempts by national banks to exceed the locational curbs of the McFadden Act. This entirely reduces the "zone of

interest" inquiry under the McFadden Act to an inquiry into "injury in fact," as the conclusion of the McFadden Act standing portion of the opinion demonstrates:

> To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

Securities Industry Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 258-59 (D.D.C. 1983). But neither standing under the Glass-Steagall Act (a statute the functional equivalent of which was at issue in *Data Processing* and *Arnold Tours*) nor injury in fact—nor the two combined—suffice to satisfy the zone of interests test under the *McFadden Act*. Thus, the District Court opinion holds either that standing under one statute confers standing to raise challenges under a separate statute—which is inconsistent with *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 140-41 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), and indeed with the whole principle behind the zone test—or that injury in fact is sufficient to confer standing—which discards the zone test entirely.

On the merits, too, the District Court's—and thus the majority's—conclusion that discount brokerage offices operated by national banks are branches seems mistaken. The McFadden Act defines a branch to "include" any place "at which deposits are received,

or checks paid, or money lent," 12 U.S.C. § 36(f) (1982), which plainly does not describe a discount brokerage office. The District Court found, however, that the statutory definition of branches is not limited to offices performing one or more of these enumerated functions, basing this conclusion on remarks by Rep. McFadden made after passage of the Act, an opinion of the Eighth Circuit (followed nowhere else) finding trust offices to be branches, *St. Louis County National Bank v. Mercantile Trust Company National Ass'n*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), and dicta in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). It seems to me, however, that the *Plant City* dicta are virtually dispositive *in favor of the Comptroller*. The Court said:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include." *The definition suggests a calculated indefiniteness with respect to the outer limits of the term.* However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135 (emphasis added). It seems to me that a statute containing a "calculated indefiniteness" presents precisely the situation in which our deference to the agency should be at its height. *See Chevron, USA, Inc. v. NRDC, Inc.*, 104 S. Ct. 2778, 2782 (1984). The Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness—or indeed that the range includes *only*

the enumerated functions—cannot by any means be considered unreasonable, even if we think it mistaken.

This circuit plays a leading role in formulating banking law, and administrative law generally, and this case squarely presents important questions in both areas. I think it should have been heard by the full court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-2865

SECURITIES INDUSTRY ASSOCIATION, PLAINTIFF

v.

COMPTROLLER OF THE CURRENCY, ET AL., DEFENDANTS

Nov. 2, 1983

MEMORANDUM OPINION

FLANNERY, District Judge.

This matter is before the court on cross-motions for summary judgment. Plaintiff Securities Industry Association ("SIA"), a national trade association representing more than five hundred securities brokers, dealers and underwriters, challenges the actions of the Comptroller of the Currency, C.T. Conover, in approving the applications of two national banks for the establishment or purchase of discount securities brokerage subsidiaries. For the reasons set forth below, plaintiff's motion is granted in part and the Comptroller's decision is reversed.

Facts

On June 23, 1982 Union Planters National Bank of Memphis applied to the Comptroller for approval of the acquisition by Union Planters of Brenner Steed

and Associates, Inc., a discount brokerage business in Memphis, Tennessee. In its application Union Planters said it intended to offer securities brokerage services through Brenner Steed at certain branch offices of Union Planters in Tennessee, at affiliated banks in Tennessee, and at correspondent banks in Tennessee and six other states.

On July 2, 1982 Security Pacific National Bank applied to the Comptroller for approval of its proposed establishment of a new operating subsidiary to provide discount brokerage services. In its application Security Pacific said the new subsidiary would offer brokerage services at certain Security Pacific branch offices and might in the future offer those services at non-branch offices in California and other states. The new subsidiary will process and extend margin loans.

Brenner Steed is, and the Security Pacific subsidiary will be, "discount" brokerages, which will buy and sell securities solely as agent, on the order and for the account of customers. Neither will purchase or sell securities for its own account, nor engage in underwriting, nor give investment advice. "Discount" brokers are so characterized because their commissions are significantly lower than those charged by full-service brokers who, in addition to trading on behalf of customers, offer investment advice.

On August 26, 1982 the Comptroller approved the Security Pacific application. On September 20, 1982 the Comptroller approved the Union Planters application, and in September, 1982 Union Planters acquired Brenner Steed. This action followed.

Discussion

SIA argues that the Comptroller's decisions should be set aside as in excess of his statutory authority for

two reasons. First, the operation of a brokerage business by a national bank or its affiliate violates Sections 16 and 21 of the Glass-Steagall Act of 1933, 12 U.S.C. §§ 24 Seventh, 378. Second, the operation of a brokerage business by a national bank or its affiliate at offices other than those branches which the bank is allowed to establish consistent with state law violates the McFadden Act, 12 U.S.C. §§ 36, 81. The court addresses these two arguments below.

A. *Standard of review*

The degree of deference due the Comptroller was described by this court in *New York Stock Exchange v. Smith*, 404 F.Supp. 1091 (D.D.C. 1975), *vacated on other grounds*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1520, 55 L.Ed.2d 538 (1978) (*"NYSE"*):

> At the outset, the court notes that it gives "great weight" to the Comptroller's ruling. The Supreme Court has consistently held that reasonable constructions of regulatory statutes by the agencies charged with enforcement of those statutes are to be respected by reviewing courts. . . . The Comptroller's [ruling] will be respected, even if the court would have reached a different result were this a question of first impression.

404 F.Supp. at 1096 (Citations omitted). The reasons for the deference accorded the Comptroller are similar to those given by the court in *A.G. Becker, Inc., v. Board of Governors*, 693 F.2d 136 (D.C. Cir. 1982), explaining its deference to the opinions of that other federal body charged with banking regulation, the Board of Governors of the Federal Reserve System. In *A.G. Becker* plaintiffs, including SIA, challenged the Board's decision to allow Bankers Trust Company to act as agent in the sale of commercial paper. In upholding the Board's decision, and in reversing the district court, the court of appeals explained that the Board's decision warranted deference because of the scope of the Board's authority, its expert knowledge of commercial banking, and its application of general, undefined statutory terms to particular facts. The court wrote:

> The regulatory structure of the banking laws must be permitted to adapt to the changing financial needs of our economy. Congress has delegated to the Federal Reserve Board, rather than to this court, the complex task of applying the Act's general proscriptions to the current business reality. We must therefore defer to the Board's interpretation of the statute if that interpretation is reasonable.

693 F.2d at 141. For the same reasons, this court must uphold the Comptroller's decision if it is reasonable.

B. *The Glass-Steagall Act*

1. *The Act does not limit bank affiliates to securities transactions solely for pre-existing customers*

SIA argues that Glass-Steagall permits banks to provide brokerage services only to pre-existing, bona fide bank customers. Glass-Steagall, says SIA, intended to erect impenetrable barriers between commercial banks and investment banks in order to avoid the kind of rampant speculation of the 1920's which brought the banking system to the brink of collapse, when banks would use depositors' money to push

speculative securities out on the market. In support of its argument SIA points to two provisions of Glass-Steagall. Section 21, 12 U.S.C. § 378, prohibits any organization "engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . securities . . ." from engaging at the same time in the banking business.[1] Discount brokers engage in the retail purchase and sale of securities and so, argues the SIA, are prohibited from being part of a banking business at the same time.

Section 16, 12 U.S.C. § 24 Seventh, limits bank brokerage activity to that "upon the order, and for the account of, customers . . .."[2] This section, says

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[1] Section 21 of the Glass-Steagall Act, 12 U.S.C. § 378, provides in pertinent part:

> [I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies . . . or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title.

[2] Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24, Seventh, provides in pertinent part:

> The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association will not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

SIA, is a very limited exception to the otherwise unyielding barrier between commercial and investment banking established by Glass-Steagall, and exists only in order to accommodate existing bank customers. In support of its position, SIA cites several early Comptroller opinions holding that Section 16 limits bank brokerage transactions to those performed for customers of the bank whose relationship with the bank exists independently of the securities transaction. *See, e.g.,* 1 *Bulletin of the Comptroller of the Currency* No. 2 at 2 (Oct. 26, 1936). Although the first such opinion dates from 1936, SIA maintains that the Comptroller has affirmed that interpretation of Section 16 until today. The SIA concedes that the Comptroller modified his position in 1974 when, in approving an application to provide Automatic Investment Services, a ruling upheld by this court in *New York Stock Exchange v. Smith, supra,* the Comptroller reversed his prior interpretations to say that "accommodation" did not mean that banks could not charge customers for the brokerage service. But the Comptroller left untouched, says SIA, the requirement that the customer relationship exist independent of the securities transaction conducted as part of the brokerage services.

The court is not persuaded by SIA. The language of Section 16 limiting bank securities to those "for the account of customers" does not limit bank brok-

erage activity, but serves to distinguish such activity from buying and selling of securities by the bank for its own account. Despite the exhaustive cataloging in the legislative history of Glass-Steagall of the ills arising out of the previous intermingling of investment and commercial banking, *see, e.g.*, S. Rep. No. 77, 73rd Cong., 1st Sess. 8-10 (1933), there is no mention of limiting bank brokerage activity. On the contrary, the one mention appearing in the legislative history says that Glass-Steagall will permit national banks to sell and buy securities for their customers "to the same extent as heretofore." *Id.* at 16. And as the Comptroller demonstrates, through citation both to earlier case law and secondary sources, prior to the passage of Glass-Steagall banks offered brokerage services to members of the general public, and not just to existing customers. *See, e.g., Blakey v. Brinson*, 286 U.S. 254, 52 S.Ct. 516, 76 L.Ed. 1089 (1932); *McNair v. Davis*, 68 F.2d 935 (5th Cir. 1934), *cert. denied*, 292 U.S. 647, 54 S.Ct. 780, 78 L.Ed. 1497 (1934).

The early opinions of the Comptroller relied on by SIA embody "an overcautious approach to bank regulation reflecting the atmosphere of the years immediately after the 1929 market crash . . ." *NYSE, supra*, 404 F.Supp. at 1097, and have gradually been disavowed by the Comptroller in the intervening decades. As the Comptroller stated in 1974, commenting on his reversal of an earlier decision disallowing bank charges for brokerage services:

> This [earlier] view, like many others expressed by regulators, in the immediate post-depression decades, was designed to be ultra-conservative and to confine banks as narrowly as possible in their activities. However, in this regard, the office apparently went further in the direction of conservatism than did the Congress, since neither the word nor the idea of the "accommodation" limitation appears in the statute or in any committee or floor comments.

Letter from James E. Smith, Comptroller of the Currency, to G. Duane Vieth (June 10, 1974), *reprinted in* [1973-78] Fed. Banking L. Rep. (CCH ¶ 96,272).

The court's understanding of the scope of the prohibitions of Glass-Steagall is reinforced by analysis of Section 20 of the statute, 12 U.S.C. § 377, which provides that a bank may not be affiliated with any organization which is "engaged principally in the issue, flotation, underwriting, public sale, or distribution of stocks, bonds, debentures, notes or other securities." [3] The language of Section 20 makes clear that the line Congress sought to draw between commercial and investment banking did not prohibit bank affiliate brokerage activity. The prohibition of Section 20 is clearly aimed at the investment banking business by which large blocks of securities newly-issued by corporations are brought by investment banks for resale to the public. In such a transaction the investment banks buy for their own account and assume the risk that the market may not be recep-

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[3] Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377, provides in pertinent part:

> [N]o member bank shall be affiliated . . . with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

tive to these securities. Such activities are, therefore, fundamentally different from brokerage activities, where the broker buys and sells only as agent and for the account of the customer. The phrase "at retail" in the statute may not be read to encompass brokerage activities because it must be read consistently with the other words in the same phrase. *Third National Bank in Nashville v. Impac, Ltd.*, 432 U.S. 312, 322, 97 S.Ct. 2307, 2313, 53 L.Ed.2d 368 (1977).

The court's conclusion is in accord with the opinion of the Board of Governors of the Federal Reserve Board approving the purchase by Bank America Corporation, a bank holding company regulated by the Board pursuant to the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.*, of the discount brokerage services through its wholly-owned subsidiary Charles Schwab & Co., Inc., 69 Fed. Res. Bull. 105 (1983). In its opinion the Board analyzed Sections 20 and 16 of the Glass-Steagall Act and concluded that the acquisition and operation of a discount brokerage service by a member bank was consistent with both the language and purpose of the Act. The Board's opinion was affirmed by the Second Circuit in *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 716 F.2d 92 (2d Cir. 1983).

2. *The requirement that bank purchases and sales of securities be "without recourse" does not prohibit brokerage activity by bank subsidiaries*

Section 16 of the Glass-Steagall limits bank securities dealings to buying and selling of securities "without recourse." SIA contends that the phrase "without recourse" must not be given a technical, commercial meaning, but must be read broadly. SIA relies on the case of *Awotin v. Atlas Exchange Bank of Chicago*, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393 (1935), where the Supreme Court wrote:

> The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of "recourse" growing out of the transaction of the business.

A brokerage subsidiary of a national bank could become contingently liable on a securities transaction, argues SIA, if the customer buyer failed to pay for the securities or if the customer seller failed to deliver the securities as promised. Such liability is prohibited by the "without recourse" limitation, says SIA.

SIA's reliance on *Awotin* is misplaced. In that case banks had agreed by separate contract to repurchase bonds at maturity at par plus accrued interest—the very sort of guarantee the Comptroller admits is prohibited by Section 16, but which is absent from a brokerage transaction. The *Awotin* court simply held that the "without recourse" language reached "any other form of contract by which the bank assumes the risk of loss which would otherwise fall on the buyer of securities." 295 U.S. at 211-12, 55 S.Ct. at 675-76. This is not the risk a bank incurs in a brokerage transaction.

As the Federal Reserve Board explained in its *Bank America* decision: "The ordinary commercial meaning of 'without recourse' indicates that section 16 prohibits a bank from assuming the liability of endorser or maker with respect to the securities bought or sold as agent of the customer." *In re Bank Amer-*

ica Corp., 69 Fed.Res.Bull. at 115, n. 50. The Second Circuit upheld that determination, writing:

> [W]e do not think that Schwab trades "without recourse" simply because it faces the kind of incident liability to which SIA refers. Schwab can maintain actions for breach of contract against customers who fail to pay for or deliver securities and thus, giving the words their ordinary meaning, is not "without recourse" against such customers.

Securities Industry Association v. Board of Governors of the Federal Reserve System, supra, 716 F.2d 92 at 100 n. 4.

In accordance with the foregoing, the court holds that the Glass-Steagall Act does not prohibit the ownership and operation by national banks of subsidiaries engaged in the brokerage business.

C. *The McFadden Act*

The National Bank Act of 1864, which created national banks, originally allowed national banks to operate only out of one central office named in the bank's certificate of incorporation. The statute provided:

> The usual business of each national banking association shall be transacted at an office or banking-house located in the space specified in its organization certificate.

R.S. 5190 (1864).

Later, state banks began to establish branch offices. In order to equalize competion between state and national banks Congress amended the banking laws

in 1972 in the McFadden Act to provide that national banks could carry on their general business not only at the central office, but also at branch offices which they could establish, upon Comptroller approval, to the extent which state law permitted state banks to establish branches. Section 8 of the McFadden Act amended the National Bank Act to provide:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with [12 U.S.C. § 36].

R.S. 5190, 12 U.S.C. § 81.

"Branches" were defined in Section 36(f) of the Act:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f).[4]

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[4] 12 U.S.C. § 36 provides, in pertinent part:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said asociation is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by impli-

SIA argues that, if it is legal for national banks to carry on brokerage activity through their subsidiaries, then at the very least the banks' operation of their brokerages must be limited to the branch offices they are presently permitted. Both Union Planters and Security Pacific indicated their intention to operate their brokerage subsidiaries at non-branch offices within their respective states, as well as at offices in other states across the country. Still, the Comptroller approved their applications. The Comptroller's decision, contends SIA, exceeded his authority and is contrary to the branching restrictions of the McFadden Act and so must be overturned.

1. *Standing*

The Comptroller responds to SIA's challenge by arguing first that SIA is without standing to bring it. Any additional injury which SIA might suffer from the location of brokerage subsidiary offices at places other than the bank's central office and chartered branches is speculative, says the Comptroller. And the McFadden Act branching restrictions were designed to promote competitive equality between state and national banks, not to protect securities dealers. SIA can show no injury and is not within the zone of interests sought to be protected by the Act, concludes the Comptroller, and therefore is

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cation or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

* * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received, or checks paid, or money lent.

without standing to challenge the Comptroller's decision under the Act.

The Comptroller's argument is not persuasive. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) ("*Data Processing*"), the Supreme Court held that an organization of providers of data processing services had standing to challenge a ruling by the Comptroller permitting national banks to make data processing services available to other banks and to bank customers. The organization had standing, the court explained, in part because they had alleged that "competition by national banks in the business of providing data processing services might entail some future loss of profits for petitioners." 397 U.S. at 152, 90 S.Ct. at 829. Similarly, SIA has alleged that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them. And it is obvious that the greater number of offices from which banks are allowed to conduct their brokerage business, the greater will be the inroads the banks will be able to make into the business of SIA's members. Accordingly, SIA has alleged sufficient injury to confer standing.

Nor need there be any explicit expression in the statute or its legislative history for the court to find that SIA is within the zone of interests protected by the McFadden Act. In *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970), the Supreme Court reversed the dismissal for lack of standing of a complaint by independent travel agents who challenged the Comptroller's ruling that national banks may provide travel services for their customers. The court, relying on *Data Processing*, noted "a growing trend 'toward enlargement

of the class of people who may protect administrative action.'" 400 U.S. at 46, 91 S.Ct. at 159. The court in *Data Processing* "did not rely on any legislative history showing that Congress desired to protect data processors alone." *Id.* The question is whether a challenged statute "'arguably brings a competitor within the zone of interests protected by it.'" *Id.*

The only mention of *Data Processing* of the legislative history of the statutory provision at issue was that the provision was a "response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled 'banks to engage in a nonbanking activity,' and thus constitute 'a serious exception to the accepted public policy which strictly limits banks to banking.'" *Arnold Tours, supra*, 400 U.S. at 46 n. 3, 91 S.Ct. at 159 n. 3, quoting *Data Processing, supra*, 397 U.S. at 155, 90 S.Ct. at 830 (citations omitted). Similarly here, the branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities. To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

2. The McFadden Act limits the business of a national bank's discount brokerage subsidiary to the bank's central office and chartered branches

On the merits, the Comptroller argues that the branching restrictions of the McFadden Act apply only to the three activities which are enumerated in the definition of "branch" within the statute: receipt of deposits, payment on checks, or lending money. Only one of these activities will even arguably exist at the brokerage offices—the lending of money when the brokerage extends margin loans to customers, but those loans will only "originate" at the brokerage offices. Final approval will be given at the central office, and under Comptroller regulations, 12 C.F.R. § 6.7380, the origination of a loan later approved at another office does not constitute the lending of money by the originating office. Because brokerage activities are not among those enumerated in the Act, says the Comptroller, its restrictions do not apply. In any event, he concludes, the Act limits only the branches which a national bank may have within the state of its central office. No restrictions apply to offices outside that state.

After careful consideration of the Comptroller's decision, and with due regard for the deference owed him, the court finds that the Comptroller exceeded his authority, in contravention of law, in approving the applications of Union Planters and Security Pacific without regard to the branching restrictions of the McFadden Act. The Comptroller's literal reading of the statute is contradicted, first, by the legislative history of the Act. Shortly after the Act's passage, is sponsor, Representative McFadden, placed a section-by-section analysis of it in the Congressional

Record. That analysis described the definition of "branch" in Section 36(f) as follows:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office* is a branch if it is legally established under the provisions of this act.

69 Cong.Rec. 5816 (1927) (emphasis added). Although the Comptroller urges the court to disregard Representative McFadden's remarks because they came after the Act's passage, other courts have cited the above passage as authoritative. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 134 n. 8, 90 S.Ct. 337, 343 n. 8, 24 L.Ed.2d 312 (1969); *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 931-32 (D.C.Cir. 1976).

The Supreme Court has indicated that a broader, more flexible interpretation must be made of the statute than that followed by the Comptroller. In *Dickinson, supra*, the Comptroller gave a national bank in Florida permission to operate an armored car and a secured receptacle in a shopping center, both staffed by tellers, for the receipt of deposits and cashing of checks by customers. State banking regulators ordered the bank to stop providing the off-premises services because Florida law prohibits branch banking altogether. The bank brought suit for declaratory and injunctive relief in federal court. The Supreme Court held that the off-premises services constituted a "branch" in violation of the McFadden Act, and in doing so explained:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include". The definition suggests a *calculated indefiniteness* with respect to the outer limits of the term. However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; *it may include more.*

396 U.S. at 135, 90 S.Ct. at 344 (emphasis added).

Other courts faced with similar questions have expressly held that bank offices at which business is conducted other than the three functions enumerated in the Act nonetheless are "branches" within Section 36 and therefore subject to state law restrictions on branch locations. In *St. Louis County National Bank v. Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir.1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2975, 54 L.Ed.2d 1093 (1977), the Comptroller approved the establishment by Mercantile of a trust office in a St. Louis suburb. A state bank brought suit for declaratory and injunctive relief, contending that the trust office had been established in violation of state law limiting bank branches. Mercantile argued, as does the Comptroller here, that because the trust office did not receive deposits, pay checks, or lend money, the McFadden Act did not apply. The Eighth Circuit rejected the argument, affirming the district court grant of injunctive relief, concluding "the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking." 548 F.2d at 719. Examining the services provided by the trust office, the court found

that the office performed services routinely offered at the bank's main office and increased convenience for the bank's customers. Based on those facts, the court held that the trust office was a "branch" within Section 36(f). *Cf. Colorado v. First National Bank of Fort Collins*, 540 F.2d 497, 499-500 (10th Cir.1976) ("accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank at the present time provides many other services"), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1102, 51 L.Ed.2d 537 (1977).

This court has held that the Glass-Steagall Act permits national banks to operate discount brokerage subsidiaries. The provision of brokerage services as described in the Security Pacific and Union Planters applications—at numerous locations in many states —is clearly aimed at attracting and servicing customers conveniently. The brokerage business, therefore, is within the category of "general business" which national banks may conduct at their main office and, as such, is subject to the branching restrictions in 12 U.S.C. § 81 and 12 U.S.C. § 36.

The Comptroller's final argument that the McFadden Act restrictions apply only to branches within the state where the bank has its central office must also be rejected. It ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the location of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintain offices outside their home state.

In accordance with the foregoing, the court holds that an office of a national bank for the conduct of discount brokerage activities is a "branch" within the

definition of Section 36(f) of the McFadden Act, subject to state law restrictions on the establishment of bank branch offices. The Comptroller's decision to the contrary, in approving the applications of Security Pacific and Union Planters for the establishment or purchase of a discount brokerage subsidiary without regard to the branching restrictions of the McFadden Act, shall therefore be reversed.

The parties shall submit proposed Judgments in accordance with this Opinion within ten days of the date of its filing.

APPENDIX D

COMPTROLLER OF THE CURRENCY
ADMINISTRATOR OF NATIONAL BANKS
Washington, D.C. 20219

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY SECURITY PACIFIC NATIONAL BANK TO ESTABLISH AN OPERATING SUBSIDIARY TO BE KNOWN AS SECURITY PACIFIC DISCOUNT BROKERAGE SERVICES, INC.

DECISION

Background

Security Pacific National Bank (Security Pacific), Los Angeles, California, proposes to establish an operating subsidiary to be named Security Pacific Discount Brokerage Services, Inc. (Discount Brokerage). The subsidiary will engage, solely as agent on behalf of its customers, in the purchase and sale of all types of securities. It will also provide margin loans to customers and pay interest on credit balances in customer accounts in accordance with applicable requirements. These services will initially be offered to the public throughout the State of California at authorized branch offices. However, Discount Brokerage intends ultimately to offer these services at non-branch locations inside and outside California. It also intends ultimately to make these services available to the customers of other financial institutions that will act as introducing brokers. Certain incidental operations, such as maintaining record custody of customer's securities and clearing and settlement of

transactions, may be performed at an office outside California.

Discount Brokerage will be a registered broker-dealer under the Securities Exchange Act of 1934, registering first with the Securities and Exchange Commission and later with the National Association of Securities Dealers. It will also register with the California Department of Corporations and, to the extent required, other state securities commissions. Discount Brokerage may also seek membership on one or more national securities exchanges.

Applicability of the Glass-Steagall Act

A reading of the provisions of the Banking Act of 1933 commonly referred to as the Glass-Steagall Act —*i.e.*, Sections 16, 20, 21, and 32—and of the relevant legislative history and judicial decisions makes it clear that only certain specified securities activities are prohibited to banks. Specifically, Section 16 of the Act, codified in 12 U.S.C. § 24 (Seventh), states that national banks may not, with various exceptions not relevant here, "underwrite any issue of securities or stock." The Section, however, further delineates permissible and impermissible activities in stating that the "business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account." Thus, on its face, the Glass-Steagall Act permits those securities purchases and sales for customers in which the bank acts in the capacity of agent (*i.e.*, brokerage transactions), while generally prohibiting purchases and sales by banks acting as

principal. This constitutes clear authorization for banks and, hence, their operating subsidiaries (*see* 12 C.F.R. § 7.7376) to engage in the activities contemplated for Discount Brokerage.

Certain early opinions of this Office imposed limitations upon the securities brokerage activities of national banks. As early as 1936, the Office expressed the opinion that national banks could purchase and sell securities only for existing customers of the bank and had to receive prior payment or have assets of the customer on hand to cover the transaction. Transactions were to be undertaken solely as an accommodation to the existing customers, and compensation was limited to the fair cost of handling the transaction. 1 *Bull. of the Comptroller of the Currency*, No. 2, at 2-3 (Oct. 26, 1936). These views were codified in Paragraph 220 of the Comptroller's first *Digest of Opinions* in 1948, although the compensation provision was relaxed slightly. It was relaxed further in Paragraph 220A of the 1957 edition of the *Digest of Opinions*. In 1963, when the *Digest of Opinions* was superseded by the *Comptroller's Manual for National Banks*, all the provisions limiting the securities brokerage activities of national banks were deleted entirely.

The Office's early restrictive views are explained in a 1974 letter by Comptroller James E. Smith as reflecting "the great caution of banking regulations in the years immediately following the 1931-32 debacle." Letter to G. Duane Vieth (June 10, 1974). The letter went on to state that the early interpretations contained restrictions not imposed by the statute and accordingly were currently viewed to be erroneous. The letter enunciated this position in permitting national banks to offer Automatic Investment Service (AIS) programs to customers. Under AIS programs banks would provide lists of corporations to their customers and then periodically purchase for them shares of stock of the companies selected by the customers from the list, paying for the securities by debiting the customers' checking accounts. The brokerage services thus offered AIS customers are functionally equivalent to, albeit somewhat more narrow in scope than, the services Security Pacific proposes to offer to Discount Brokerage customers. As in the case of an AIS program, as discussed in detail in the 1974 letter, the services covered by this application are clearly authorized by the language of Section 16 of the Glass Steagall Act and do not contravene the purposes of the Act, either by subjecting banks to material risks or by placing them in situations with unacceptable conflicts of interest deriving from the promotional pressures facing them. *See Investment Company Institute v. Camp*, 401 U.S. 617, 631-38 (1971).

The rejection of the restrictive position reflected in the Office's early opinions has found support in the courts. In *New York Exchange, Inc. v. Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated on other grounds sub nom. New York Stock Exchange v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978), the court upheld the broader position adopted in the 1974 AIS letter. Specifically citing the argument made in the 1974 AIS letter that the early opinions "embodied an overcautious approach to bank regulation reflecting the atmosphere [sic] of the years immediately after the 1929 market crash rather than the legislative history of the act," the court went on to endorse AIS programs as falling within the statutory authorization of Section 16 of the

Act and not presenting any of the risks discussed in the Act's legislative history or the judicial elaboration of it. *New York Stock Exchange, Inc. v. Smith, supra,* at 1097-1100.

Various statements by the Supreme Court in cases addressing Glass-Steagall Act issues suggest that the express language of the Act is the primary factor in any analysis and that securities brokerage activities by banks are not proscribed by the Act. In *Investment Company Institute v. Camp,* 401 U.S. 617 (1971), the Court analyzed a bank's participation in the organization, distribution, and marketing of shares of an investment company consisting of commingled managing agency account assets held by the bank as fiduciary. The Court found the bank's participation to clearly contravene the express language of Section 16 of the Act and to further subject the bank to the risks and conflicts Congress sought to obviate by the Act. Accordingly, the Court found the bank's program to be in violation of the Act. The Court was careful, however, to distinguish this prohibited activity from permissible activities, including purchases as agent for customers of securities. *Id.* at 623 n.10, 624-25

The same type of statutory analysis was used by the Court in *Board of Governors of the Federal Reserve System v. Investment Company Institute,* 450 U.S. 46 (1981). That case upheld a ruling of the Federal Reserve Board (FRB) that serving as investment adviser to an open-end investment company and organizing and sponsoring, subject to certain limitations, a closed-end investment company were closely related to banking and could legally be undertaken by bank holding companies and their nonbank subsidiaries. The Court could find no prohibition of this conduct in the various provisions of the Glass-Steagall Act and accordingly rejected arguments based solely on broad statements of the policies embodied in the Act. The Court described the analysis employed in *Investment Company Institute v. Camp, supra,* as relying "squarely on the literal language of §§ 16 and 21 of the Glass-Steagall Act." 450 U.S. at 65. The Court went on to explain that the analysis of the risks presented in the earlier case was necessary only to respond to arguments on behalf of the bank that despite the literal prohibition on the conduct then at issue it was not the intent of Congress to prohibit it. 450 U.S. at 66. The Court also reiterated its earlier views that purchases of securities by banks acting as agent for their customers are specifically authorized by the Glass-Steagall Act. 450 U.S. at 55-56 n.18.

There is language in the legislative history of the Glass-Steagall Act to the effect that national banks were to be authorized by Section 16 to engage in securities brokerage transactions "to the same extent as heretofore." This language appears only to have meant generally that the ability of national banks to engage in brokerage transactions was to be subject to no additional constraints after the enactment of the Glass-Steagall Act beyond those applicable before its enactment. This analysis appears to have been adopted by the court in *New York Stock Exchange, Inc. v. Smith* 404 F. Supp. 1091, 1098. Noting that there was considerable evidence that prior to 1933 banks did engage in brokerage transactions, the court concluded that even if the AIS programs under consideration were viewed as a more extensive involvement by banks in the brokerage business than existed

prior to 1933, they nonetheless were not prohibited by the statutory language or the legislative history if they did not give rise to risks materially different from those normally associated with brokerage transactions. In view of the significant changes that have taken place since 1933 in the nature and delivery of brokerage services, this approach seems particularly appropriate.

The same argument concerning the "heretofore" language applies to the incidental activities that Security Pacific intends to perform through Discount Brokerage. That is, such functions as maintaining custody of securities for customers and clearing and settling their securities transactions, even in the absence of evidence that banks provided those services prior to 1933, do not exceed the statutory authorization in Section 16 of the Glass-Steagall Act so long as Discount Brokerage maintains its agency status in the transactions. Since these activities do not involve Discount Brokerage's taking any position in securities and do not create any promotional pressures by associating Discount Brokerage's name or financial prospects (or Security Pacific's) with that of any securities issuer, they do not appear to give rise to any of the risks the Act sought to address. It should also be noted that these types of activities are regularly performed by national banks, without any explicit statutory authorization beyond the incidental powers language of 12 U.S.C. § 24 (Seventh), in connection with the U.S. government and municipal securities dealer activities authorized in that Section.

The "heretofore" language in the legislative history could also be cited in connection with Security Pacific's intention to seek membership on national securities exchanges for Discount Brokerage. Because

of certain rules of at least the New York Stock Exchange (NYSE) prior to 1933, direct stock exchange membership by a national bank would have been impossible then. However, the large commercial banks clearly did have their representatives on the floor of the exchanges. *See, e.g.*, Sobel, *NYSE* 13-14 (1975). Further, various private bankers were members of the exchanges prior to the passage of the Glass-Steagall Act and at least one such company has maintained continuous NYSE membership since before the passage of the Act. In this regard, the NYSE proposed to adopt new Rule 310 in 1976 that would have prohibited a commercial bank not then a member of the NYSE from becoming such a member. The Glass-Steagall Act was cited by the NYSE as one reason for proposing the rule. In rejecting this rule, the Securities and Exchange Commission expressed skepticism about permitting existing bank members of the NYSE to retain their membership while prohibiting additional banks from joining, since Section 21 of the Glass-Steagall Act * (12 U.S.C. § 378) does not contain a grandfathering exception. The Commission concluded, quite properly, that the NYSE's position was subject to substantial doubt and, in any event, that resolution of the issue should be left to the federal banking agencies or the courts. *See* Securities Exchange Act Release No. 12737 (Aug. 25, 1976).

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* Section 21 of the Glass-Steagall Act prohibits any person engaged in the issuing, underwriting, selling, or distributing of securities from also engaging in the business of receiving deposits. The Section expressly states, however, that activities authorized by Section 16 of the Glass-Steagall Act are not prohibited for depository institutions, including private bankers.

Whatever the pre-1933 history reveals with respect to exchange membership, however, should not be determinative of whether national banks may now be such members. The relevant concern is whether national banks as exchange members can conform their functional participation in securities transactions to the agency role permitted in Section 16 of the Glass-Steagall Act. Since acting solely in an agency capacity is possible, *see, e.g.*, NYSE Rule 91, and is the stated intention of Security Pacific for Discount Brokerage, exchange membership will not create any risks inconsistent with the brokerage role envisioned in the Act as permissible for national banks.

An additional Glass-Steagall Act issue arises when a bank chooses to conduct securities brokerage operations through an operating subsidiary. Section 20 of the Act, 12 U.S.C. § 377, prohibits affiliations between member banks, including all national banks, and companies "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities." Early on, the Supreme Court interpreted the identical list of restricted functions in Section 32 of the Glass-Steagall Act, 12 U.S.C. § 78, not to include securities brokerage activities of a company. *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441, 445-49 (1947). Such an interpretation seems appropriate and is, of course, entirely consistent with the view that Congress was trying to eliminate only certain risks, not including those associated with securities brokerage activities, from the commercial banking system.

Accordingly, the activities proposed by Security Pacific for Discount Brokerage are within the corporate

powers of national banks and their operating subsidiaries and are not limited by the Glass-Steagall Act.

McFadden Act

Security Pacific's application indicates that it intends to offer Discount Brokerage's services through offices that are not bank branches or the bank's main headquarters, as well as through chartered offices. It is, of course, an element of our approval of the application that the geographic limitations effectively imposed by the National Bank Act's branching provisions, commonly referred to as the McFadden Act, not be violated. 12 U.S.C. § 36. "Branch" is statutorily defined to include "any branch bank, branch office, branch agency, additional office or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). Security Pacific's legal memorandum, submitted as part of the application, expresses the opinion that the non-chartered offices at which Discount Brokerage will offer its services will not constitute branches under the McFadden Act because none of the statutory branching functions will be performed there.

Lending Money

Regarding the lending of money, the application states that Discount Brokerage will not make margin loans at non-branch offices. Such offices will be limited to the performance of tasks associated with loan origination within parameters analogous to those authorized by the Comptroller's Interpretive Ruling 7.7380 (12 C.F.R. § 7.7380). Interpretive Ruling 7.7380 authorizes the

> [o]rigination of loans by employees or agents of a national bank or of a subsidiary corporation at

> locations other than the main office or a branch office . . . [*p*]*rovided*, [t]hat the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.

12 C.F.R. § 7.7380(b).

The Comptroller has identified certain loan solicitation and origination activities that clearly may be performed by loan production offices within the scope of the Interpretive Ruling. These include:

1) solicitation of loan business, including by means of advertisements disclosing the nature and limitations of the [loan production office];

2) providing information as to loan rates and terms;

3) interviewing and counseling applicants regarding loans (only), including the provision of disclosures required by regulations;

4) aiding customers in the completion of loan applications.

See, e.g., Letter from John G. Heimann, Comptroller of the Currency, to Exchange National Bank & Trust Company of Atchison, Atchison, Kansas (Jan. 31, 1979).**

** In *Independent Bankers Association of America v. Heimann*, 627 F.2d 486, 488 n.** (D.C. Cir. 1980) (*IBAA v. Heimann*), the court expressed general agreement with the non-branch status of loan production offices engaging in the limited array of functions set out in the letter.

Security Pacific's legal memorandum indicates that Discount Brokerage offices at non-branch locations will interview and counsel customers on loan rates and terms and aid customers in the completion of margin loan applications. Loan applications will then be transmitted to a chartered office at which they will be processed and at which any credit will be extended. The performance of these and other solicitation and origination activities, analogous to those outlined above, at non-branch Discount Brokerage offices in connection with the extension of margin credit at chartered offices would not, in our opinion, constitute lending money within the meaning of the McFadden Act.

Receiving Deposits

In addition to margin lending, Discount Brokerage will also maintain, and pay interest on, customer credit balances arising incidental to its brokerage business, including (1) funds awaiting investment, (2) interest or dividends received on a customer's securities held in "street" name and (3) proceeds from securities sold by the broker awaiting reinvestment or other instructions from the customer. Security Pacific takes the position that these credit balances are not deposits and, therefore, that Discount Brokerage will not be receiving deposits within the meaning of the McFadden Act.

Credit balances arising incidentally to brokerage activities may be distinguished, as correctly noted in Security Pacific's legal memorandum, on certain functional and legal grounds from bank deposits. Bank deposits are generally funds placed with a depository institution for the primary purpose of safekeeping,

earning a return in the form of interest, or facilitating payments to third parties. They may be withdrawn at the discretion of the depositor under the terms and conditions of the account. The receipt of deposits is a principal function of banks, which publicly solicit deposits to provide funds to be used in the banks' lending business. Credit balances maintained by brokers, on the other hand, arise in connection with securities transactions of customers and, as such, are not directly solicited from the public. Indeed, the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, operates to restrict the advertising, promotional and selling practices of brokers regarding interest-bearing free credit balances. *See* Securities Exchange Act Release No. 18262 (Nov. 17, 1981). Further, there are specific regulatory restrictions regarding the use of credit balances by brokers. 17 C.F.R. § 240.15c3-2.

It should be noted, too, that securities firms regularly maintain and pay interest on customer credit balances, apparently in the belief that this practice does not violate the prohibition in Section 21 of the Glass-Steagall Act against the receipt of deposits by such firms. 12 U.S.C. § 378(a)(1). The prevalence of this practice argues against the characterization of customer credit balances as deposits generally.

Security Pacific also points to the non-deposit treatment of credit balances by the FRB in connection with balances maintained by "agencies" under the International Banking Act of 1978, 12 U.S.C. § 3101 *et seq.*, and by investment companies chartered under Article XII of the New York Banking Law. The value of these examples, which have been drawn from the specialized context of international finance, is, however, clouded by the inclusion of "credit balances" within the definition of "deposits" in FRB Regulation D, 12 C.F.R. § 204.2(a)(1)(vi). Even assuming that credit balances are treated as deposits for the narrow monetary control purposes of Regulation D, however, it should be recognized that the meaning of deposit may be different in other regulatory or statutory contexts, such as under the McFadden Act. Based on all of the foregoing considerations, it is our opinion that credit balances arising in connection with securities brokerage transactions are not deposits within the meaning of the McFadden Act.

Non-enumerated Functions

It is further possible that Discount Brokerage offices could be found by a court to be branches within the meaning of the McFadden Act even in the absence of a finding that they receive deposits, pay checks or lend money. In *St. Louis County National Bank v. Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir.), *cert. denied*, 433 U.S. 909 (1977) (*St. Louis County*), a trust office operated by a national bank, which conducted a substantial amount of trust business at its main office, was held to be a branch, even though no deposits were received, checks paid or money lent at such office.

In the view of the Eighth Circuit, at least, the transaction with the public of certain business routinely carried on at the bank's main office constitutes branch banking activity for McFadden Act purposes. This Office finds the approach taken by the court in *St. Louis County* an overly broad reading of the statute, and we believe that the court's holding should at the very least be limited to those dealings with the public

requiring a specialized banking or similar license. In any event, finding that securities brokerage activity constitutes a branch banking function would appear particularly inappropriate in view of the number of banks currently operating U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra- tate and interstate basis.

The application states the intention that an operations department, perhaps located outside California, will maintain record custody of securities held in accounts and be responsible for clearing and settlement of transactions, although initially a clearing broker may be employed to carry on some of these activities. A number of banks currently operate similar non-branch facilities to carry out these ministerial tasks relating to their municipal and government securities dealing and underwriting activities. Since the McFadden Act issue would be the same in the case of the Discount Brokerage operations department, the long-standing and widespread nature of the practice of bank municipal and government securities dealers is obviously relevant. It is, therefore, our opinion that ministerial functions not involving direct dealing with the public, such as the maintenance of record custody and the clearing and settlement of transactions, do not constitute branching functions either as enumerated in Section 36(f) or even under the expansive *St. Louis County* approach. *Cf. Independent Bankers Association of America v. Smith,* 534 F.2d 921, 936 (D.C. Cir. 1976) (no competitive advantage in dealing with public can arise from these ministerial services).

Location Where Services Are Provided

It is, of course, an element of our approval of the application that all essential branch banking functions performed in connection with Discount Brokerage's operations be performed at chartered offices. In our opinion, the activities of Discount Brokerage, viewed individually or collectively (with the exception of the making of margin loans, treated separately above), should reasonably be found not to constitute branch banking for purposes of the McFadden Act.

FRB Regulations D and Q

It is also an element of approval of the application that Discount Brokerage and Security Pacific comply with FRB Regulation D, 12 C.F.R. Part 204, and FRB Regulation Q, 12 C.F.R. Part 217. Security Pacific states in its legal memorandum that Regulations D and Q are not applicable because credit balances arising in the course of a brokerage business are not deposits within the meaning of those regulations. As pointed out earlier, however, Regulation D seemingly defines "deposits" to include "credit balances," 12 C.F.R. § 204.2(a)(1)(vi). And even though Discount Brokerage would not appear to be a "depository institution," as defined in 12 C.F.R. § 204.2(m)(1)(i), its "obligations" may be treated as "obligations" of Security Pacific ("parent depository institution") under 12 C.F.R. § 204.3(a) ("Computation and maintenance").

This Office recommends that Security Pacific should accordingly consult the FRB concerning the applicability of Regulations D and Q to this matter.

Federal Deposit Insurance

It is a further element of approval of the application that Discount Brokerage comply with all applicable provisions of the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.* Security Pacific states in the application that Discount Brokerage will apply for membership in Securities Investor Protection Corporation ("SIPC") so that customers' cash and securities held by Discount Brokerage will be protected by SIPC insurance coverage, and that cash held by Discount Brokerage will not be insured by the Federal Deposit Insurance Corporation ("FDIC"). As in the matter of the applicability of FRB Regulations D and Q, this Office recommends that Security Pacific consult the FDIC in this regard.

Conclusion

This Office has carefully considered the legality of the activities proposed by Security Pacific for Discount Brokerage. For the reasons presented above, we believe these activities are legally permissible. Based on this legal analysis and our consideration of other relevant information presented by Security Pacific, the application is approved this day.

/s/ Doyle L. Arnold
DOYLE L. ARNOLD
Senior Deputy Comptroller
for Policy and Planning

Dated: 26 August 1982

APPENDIX E

September 20, 1982

Mr. Richard C. Raines
Senior Vice President
Union Planters National Bank of Memphis
67 Madison Avenue
Memphis, Tennessee 38103

Dear Mr. Raines:

The Office of the Comptroller of the Currency has approved the bank's application to acquire Brenner Steed & Associates, Inc., Memphis, Tennessee.

Please advise the Regional Administrator of National Banks in Memphis of the date on which the acquisition of the subsidiary is consummated and furnish its exact address, including street number, and the corporate name.

Very truly yours,

/s/
James E. Brennan
Manager, Bank Structure Analysis
Bank Organization and Structure

bcc: Case
Region 8
Chron: JFA
Chron:JEB
Chron:jj
reader

JFAlmand/jj/September 20, 1982 0880C

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 82-02865
No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, ET AL., APPELLANTS

Civil Action No. 82-02865
84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C.T. CONOVER, COMPTROLLER OF THE CURRENCY,
OFFICE OF THE COMPTROLLER OF THE CURRENCY

Appeals from the United States District Court
for the District of Columbia

[Filed Apr. 12, 1985]

Before: WRIGHT, GINSBURG, and SCALIA, Circuit Judges.

JUDGMENT

These causes came to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: April 12,1985
Opinion Per Curiam.
Opinion concurring in part and dissenting in part filed by Circuit Judge Scalia.

★ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20056

Nos. 85-971, 85-972

FILED
FEB 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,

—v.—

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

—v.—

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Of Counsel:

WILLIAM J. FITZPATRICK
Securities Industry
Association
120 Broadway
New York, New York
(212) 608-1500

DONALD J. CRAWFORD
Securities Industry
Association
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 296-9410

JAMES B. WEIDNER
Counsel of Record
DAVID A. SCHULZ
MARK HOLLAND
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8235

Attorneys for Respondent

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the court below correctly hold that discount brokerage, offered as a part of a national bank's general business, is subject to the statutory limits on the locations for that business?

2. Did the court below correctly hold that securities brokers harmed by competition from expanded locations for bank brokerage activities have standing to challenge a narrow construction of the statute arguably intended to limit that competition?

PARTIES TO THE PROCEEDINGS BELOW

Respondent Securities Industry Association was the plaintiff-appellant-cross-appellee below.* Defendants-appellees-cross-appellants below were C.T. Conover, then Comptroller of the Currency of the United States, and the Office of the Comptroller of the Currency. Petitioner Robert L. Clarke now serves as Comptroller of the Currency. Petitioner Security Pacific National Bank was permitted to intervene by the Court of Appeals after entry of the panel opinion now sought to be reviewed.

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* Pursuant to Rule 28.1 of this Court, respondent states as follows: The Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for more than 90 percent of the securities brokerage and investment banking business in the United States.

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IN THE

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OCTOBER TERM, 1985

Nos. 85-971, 85-972

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

National banks, since Congress created them a century ago, have been severely restricted both in what they can do and where they can do it. These petitions, concerning the latter issue, are little more than an attempt to seek reargument of matters long ago put to rest. Despite their rhetoric, the petitions raise no substantial issue not previously decided against the Comptroller either by this Court or, uniformly, by several Courts of Appeals.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE COURT BELOW CONSISTENTLY APPLIED SETTLED PRECEDENT IN UPHOLDING STATUTORY LIMITS ON BANK LOCATIONS

The decision below contains nothing startling. Applying settled precedent, it holds simply that discount brokerage, as a part of a national bank's general business, is subject to long-standing statutory restrictions on the location of that business.[1]

The Court has previously reviewed the governing statutory structure. When Congress created national banks through the National Bank Act of 1864, it restricted their activities to only one location.[2] Some 60 years later, in the McFadden Act of 1927, Congress permitted national banks to establish branches in certain circumstances.[3] Today, the "general business" of a national bank remains severely restricted to only "the place specified in its organization certificate" and such "branch or branches, if any" as may be established. 12 U.S.C. § 81 ("Section 81").[4]

1 577 F. Supp. at 260; Appendix C at 28a-29a. Citations are to the Appendices annexed to the Comptroller of the Currency's Petition for a Writ of Certiorari. "Compt. Pet." refers to the Comptroller's Petition; "Sec. Pac. Pet." refers to Security Pacific National Bank's Petition.

2 *First National Bank in St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640, 656-58 (1924); *see* Rev. Stat. § 5190, ch. 106, 13 Stat. 101 (1864) (codified as amended at 12 U.S.C. § 81).

3 *See Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 42-43 (1977).

4 12 U.S.C. § 81 provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

Significantly, the Comptroller failed even to mention the provisions of Section 81 in his ruling; only his appellate counsel's "*post hoc* rationalizations" discuss that section. For this reason alone, any substantial deference to the Comptroller's arguments would be unwarranted. *See Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979, 2983-84 (1984); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 628 (1971) ("*ICI I*").

The Court addressed the statutory definition of a "branch" permitted under the McFadden Act almost 20 years ago, in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) ("*Plant City*"), and stated:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

Id. at 135 (footnote omitted, emphasis in original).[5] Applying this flexible construction, the Court there rejected the Comptroller's attempt to read the definition of "branch" narrowly, and held that an armored car messenger service operated by a national bank was a "branch" of that bank under the McFadden Act.

Courts of Appeals which have considered related branching questions also uniformly have refused attempts by the Comptroller to restrict the reach of the branching provisions. The

5 The relevant section of the McFadden Act, which is codified at 12 U.S.C. § 36(f) ("Section 36(f)"), provides:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

Eighth Circuit in *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) ("*Mercantile Trust*"), for example, specifically declined the Comptroller's argument, advanced once again here, that the term "branch" includes only the three functions specifically enumerated in Section 36(f). The Court held that "the three routine banking functions delineated in section 36(f) are *not* the only indicia of branch banking," and struck down the Comptroller's effort to sanction a bank's trust office opened at a non-branch location. *Id.* at 719 (emphasis supplied). The Courts of Appeals for the Tenth, Seventh and District of Columbia Circuits have adopted a similar approach.[6]

The court below followed the same sort of rationale and, in reaching this conclusion, cited the statement of Representative

6 *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) ("accepting deposits, or paying checks, or lending money are *not* the only indicia of branch banking. The typical bank of the present time provides many other services.") (emphasis supplied); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("*IBAA*").

Security Pacific tries to manufacture a conflict among the Circuits (Sec. Pac. Pet. at 8-18) that does not exist—an undertaking the Government understandably does not join. The "basic function" and "main office" tests postulated by Security Pacific misstate the holdings in prior decisions as well as the decision below. Prior decisions, such as *Plant City*, dealing with one of the specific activities mentioned in Section 36(f) did not define precisely the other activities permitted at a branch, because they did not need to. However, the rationale of the Eighth Circuit in *Mercantile Trust* and of the courts below in this case, which *did* reach this broader question, is no different from that set out by this Court in *Plant City* and each Court of Appeals to have construed the McFadden Act.

The extent to which petitioners reach to find *any* authority to support their position is, itself, telling: their sole authority is *Continental Illinois National Bank & Trust Co.* v. *Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976) (Compt. Pet. at 12; Sec. Pac. Pet. at 10-11), an unpublished memorandum opinion of a district court filed one month *prior* to the directly contrary ruling in *Mercantile Trust*.

McFadden found important by this Court and every Court of Appeals to have considered it:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office*, is a branch if it is legally established under the provisions of this act.

68 Cong. Rec. 5816 (1927) (emphasis supplied).[7]

It is actually the Comptroller who, by suggesting that Section 36(f) be limited only to bank activities involving "dealings with the public requiring a specialized banking or similar license," has urged an unprecedented interpretation. (Compt. Pet. at 18.) The Comptroller offers no support for this whole-cloth suggestion. Nor could he, in that two of the three functions enumerated in Section 36(f) itself—lending money and paying checks—require no national banking charter or other specialized license and are carried on by any number of entities. Obviously Congress did not intend any such restriction of the statutory definition.

Petitioners' further assertion (Compt. Pet. at 12; Sec. Pac. Pet. at 10) that the geographic limits on bank activities apply only to those functions expressly listed in Section 36(f) (receiving deposits, paying checks, or lending money), is equally unprecedented. If petitioners were correct, national banks for over a century could have located any activity other than the three listed in Section 36 anywhere in the country.[8] It is small

7 577 F. Supp. at 259; Appendix C at 26a. *See, e.g.*, *Plant City*, 396 U.S. at 134 n.8; *IBAA*, 534 F.2d at 931; *Mercantile Trust*, 548 F.2d at 719; *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d at 179; *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d at 500. In light of this precedent, petitioners' continuing effort to deride this legislative history as "post passage" (Compt. Pet. at 13 n.12; Sec. Pac. Pet. at 16) is, at best, unpersuasive.

8 Under this logic, banks could have located even the three activities enumerated in Section 36(f) nationwide during the 60 years before the branching provisions were enacted in 1927.

wonder that no court has ever reached such a preposterous conclusion, any more than any bank attempted to put it into practice for more than a century. Nor does it require review by this Court to point out the patent illogic of petitioners' assertion. As the court below put it, the Comptroller's argument

> ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the location of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintain offices outside their home state.

(577 F. Supp. at 260; Appendix C at 28a.) *Cf. Northeast Bancorp, Inc.* v. *Board of Governors*, 105 S. Ct. 2545, 2551 (1985).

Again, contrary to the petitions here, the decision below does not hold that every possible activity of a national bank would be included within these locational restrictions. The court expressly based its holding on the undeniable fact that the provision of brokerage services here "is clearly aimed at attracting and servicing customers conveniently." (577 F. Supp. at 260; Appendix C at 28a.) The court thus again applied a factor, customer convenience, that this and other courts uniformly have regarded as relevant in deciding branching questions.[9] The court below simply did not address, nor will its opinion affect, the location of bank support activities, such as data processing, that do not involve public contact. Nor does the decision below set any precedent concerning what *level* of bank activities may be permissible at remote locations; here, concededly, the brokerage facilities would involve the full panoply of discount brokerage services for the public.[10]

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9 *E.g.*, *Plant City*, 396 U.S. at 136-37 (armored car service); *IBAA*, 534 F.2d at 943 (CBCTs); *Mercantile Trust*, 548 F.2d at 719 (trust office).

10 The SIA has never contended, nor did the court below decide, that banks may not employ agents who must act elsewhere to perform functions in support of services offered at chartered locations, which is all that was involved in *Merchants Bank* v. *State Bank*, 10 Wall. (77 U.S.) 604 (1871), cited by petitioners. (Compt. Pet. at 19; Sec. Pac. Pet. at 17.) That issue concerns the *level* of activities permissible for remote locations and not the *type* of permitted activities. *See Plant City*, 396 U.S. at 137 n.10. *See also Independent Bankers Ass'n of America* v. *Heimann*, 627 F.2d 486, 487 n.** (D.C. Cir. 1980), in which the court noted that when bank loan production offices exceeded a certain level of activity in providing services to customers, those offices would be branches subject to the Act's restrictions.

In sum, geographic restrictions on the location of the business of national banks have existed since those banks were first created. The decision below, following reasoning of this Court and other Courts of Appeals, merely confirms those restrictions. There are no "special and important reasons" for granting a Writ of Certiorari in this action. Sup. Ct. Rule 17.

II.

THE COURT BELOW CORRECTLY APPLIED TRADITIONAL "STANDING" ANALYSIS

Petitioners concede, as they must, that "there obviously is adequate adversity of interest in this case to satisfy the requirements of Article III of the Constitution." (Compt. Pet. at 24 n.19; *see* Sec. Pac. Pet. at 19.) They also concede that the SIA would suffer "injury in fact" from the Comptroller's action. (Compt. Pet. at 19-20; Sec. Pac. Pet. at 19.) And, they concede that the SIA has standing to challenge the types of bank *activities* authorized by the Comptroller under the National Bank Act. (Compt. Pet. at 19-20; Sec. Pac. Pet. at 18-19.) Nevertheless, petitioners contend that this Court should review the holding below that the SIA similarly had standing under that Act to challenge the *locations* for which those activities were authorized.

Petitioners' restrictive analysis in this respect also has effectively been rejected by this Court. The "zone of interests" test raised by petitioners was first articulated in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S.

150 (1970), to reverse just the type of standing analysis petitioners now urge. In part that case, as here, concerned the standing of a bank competitor under the National Bank Act. As the Court explained, where a statute "*arguably* brings *a competitor* within the zone of interests protected by it," that competitor has standing to assert those statutory restrictions. *Id.* at 156 (emphasis supplied). The Court specifically rejected the Comptroller's argument, renewed here, that a statute must expressly protect a specific group to confer standing (397 U.S. at 157):

> The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of "aggrieved" persons who . . . are entitled to judicial review of "agency action."

Subsequently, in *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *ICI I*, 401 U.S. 617 (1971), also decided under portions of the National Bank Act, this Court affirmed the standing of competitors to challenge the Comptroller's rulings. The Court reached this result even though the specific competitors bringing suit were not mentioned in the legislative history. As the Court put it in *ICI I*, 401 U.S. at 620, the issue is whether "Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury. . . . [W]hether Congress had indeed prohibited such competition was a question for the merits."

The court below applied just this analysis. Contrary to the dissent (758 F.2d at 740; Appendix A at 3a), the majority's decision here does not reduce the "zone of interests" inquiry into a single showing of "injury in fact." Rather, the district court opinion, adopted by the majority below, held that:

> [T]he branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities . . . [and] attempts to exceed those curbs would harm SIA's members. . . .

(577 F. Supp. at 258-59; Appendix C at 24a.) The court thus determined that the statutes "arguably legislate against the competition that the [SIA] sought to challenge," and properly upheld the SIA's standing, given the undisputed existence of injury-in-fact.[11] (*See id.*; Appendix C at 24a.)

The standing analysis petitioners here advance contains the same basic flaw that pervades both their argument on the merits and the dissent below. Each dwells solely on the branching language in Section 36 of the McFadden Act. They fail to consider that Section 36 is an *exception* to the broad prohibition of Section 81 in the National Bank Act, which is equally involved. The analysis thus incorrectly focuses only on the branching exception and ignores the basic locational rule. As the court below observed, Section 81 reflects the Congressional determination, evident throughout the National Bank Act, "to curb the scope of national banks' activities" in light of the unique nature and economic power of those institutions. (577 F. Supp. at 258; Appendix C at 24a.) And, as this Court has already made clear, competitors arguably protected by such a "curb" have standing to challenge administrative efforts, as here, to reduce it. In short, the standing analysis below raises no issue warranting review by the Court.

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11 To suggest a need for "clarification," petitioners cite (Compt. Pet. at 23-24; Sec. Pac. Pet. at 21, n.26) earlier opinions in which Judge Ginsburg argued that the District of Columbia Circuit was not properly applying the precedent of this Court. *E.g.*, *Copper & Brass Fabricators Council, Inc.* v. *Department of the Treasury*, 679 F.2d 951, 955 (D.C. Cir. 1982) (Ginsburg, J. concurring). However, petitioners entirely ignore later cases making clear that Judge Ginsburg's view has now prevailed in that Circuit and the issue resolved. *E.g.*, *Autolog Corp.* v. *Regan*, 731 F.2d 25 (D.C. Cir. 1984). Thus, as a member of the panel below Judge Ginsburg concurred in the decision and did not believe the matter required rehearing or rehearing *en banc*.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petitions for a Writ of Certiorari should be denied.

Dated: February 8, 1986

Respectfully submitted,

Of Counsel:

WILLIAM J. FITZPATRICK
Securities Industry
Association
120 Broadway
New York, New York
(212) 608-1500

DONALD J. CRAWFORD
Securities Industry
Association
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 296-9410

JAMES B. WEIDNER
Counsel of Record
DAVID A. SCHULZ
MARK HOLLAND
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8235

Attorneys for Respondent

Nos. 85-971, 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, Comptroller of the Currency,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Associate General Counsel-Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-4240

Attorneys for Amicus Curiae

January 10, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Whether the McFadden Act is applicable to offices of a national bank at which no money is lent, no deposits accepted and no checks paid.

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS

The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of

the parties, to urge the Court to grant the Petitions for Writ of Certiorari to review that part of a decision by the United States Court of Appeals for the District of Columbia Circuit which held that discount brokerage offices of national banks are "branches" of the banks and therefore governed by the geographical limitations upon the location of such offices imposed upon "branches" of banks by the McFadden Act, 12 U.S.C. § 36.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. Its membership of approximately 12,000 banks includes banks chartered by the Comptroller of the Currency ("national banks") and banks chartered by the states in which they are located ("state banks"). ABA member banks are located in each of the fifty states and the District of Columbia. The Association frequently appears in litigation, either as a party or as an amicus curiae, in order to represent the interests of the banking industry at large in particularly important cases. This is such a case. The Association has appeared as amicus curiae in this case in both the District Court and in the Court of Appeals.

Officially, this case presents the question whether or not discount brokerage offices established under the auspices of an operating subsidiary of a national bank are "branches" for purposes of the McFadden Act. In and of itself, that is a question of major importance to the banking industry, since several thousand commercial banks are involved, in one way or another, in the discount brokerage business. If the

decision of the District of Columbia Circuit stands, the Comptroller will be compelled to withdraw his approval of existing discount brokerage offices of national banks operating across state lines and to refuse approval to any future applications by national banks to establish such offices. In addition, it is probable (though in most cases not compulsory) that state regulators and state courts construing state branching statutes would follow the District of Columbia Circuit's determination that discount brokerage offices are, indeed, "branches" of banks. That would have a deleterious impact upon state bank members of the American Bankers Association as well.

However, in its broadest implications, this case is not only about discount brokerage offices. This is an era of "deregulation" of the banking industry. Through recent enacted legislation, administrative actions of the federal banking regulatory agencies, and a series of judicial decisions by this and lower courts, commercial banks are expanding the range of products and services they provide for the public well beyond the simple taking of deposits, lending of money, and paying of checks. It is a crucial—and unanswered—question where these expanded activities may be performed. In order to answer that question, the industry, the bench and the bar must have definitive guidance, which only this Court can supply, on what does and does not constitute a "branch" of a bank. This Court has previously held that the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. *First National Bank in Plant City v. Dickinson,* 396 U.S. 122, 135 (1969) (emphasis supplied).

The American Bankers Association, on behalf of its members, is vitally interested in having the Court now flesh out the *more*, if anything, which the definition *may* include, and this case is clearly an appropriate vehicle for doing so.

SUMMARY OF THE ARGUMENT

This Court has left open the question of whether a place of business of a national bank is a branch of that bank, even if no money is lent there, no deposits accepted, and no checks paid. In the principal Supreme Court decision in this area, the Court found that deposits were in fact received at the alleged "branch," thus bringing it within the clear meaning of the statute. Consequently, this Court did not then have occasion to determine, in a true case and controversy, how far the meaning of the word "branch" could be stretched. Since national banks have maintained, and do maintain, places of business at which only activities other than the three mentioned in the McFadden Act are performed, and the existence of those business locations has inspired continuing litigation, we respectfully suggest that the interpretation of the McFadden Act is an important question of federal law which has not been, but should be, decided by this Court.

It is particularly important for the Court to resolve the continuing disputes over the proper construction of the McFadden Act in this case, because the Court of Appeals below, the District of Columbia Circuit, is the one having the power to establish a nationwide construction of the McFadden Act. The Comptroller, whose approval is necessary for a national bank to create an operating subsidiary, can always be sued in

the District of Columbia for granting such an approval, 28 U.S.C. § 1319(e), and the District of Columbia Circuit has decided this important issue of federal law incorrectly. The history of national banking which led to the enactment of the McFadden Act shows, definitively, that national banks did operate places of business away from the chartered premises of the bank prior to the enactment of the McFadden Act; those places of business were less than full service branch offices; and the intent of the law was not to limit the operation of those non-full-service locations, but rather to *allow* the operation, in appropriate circumstances, of business locations which *were* full service facilities.

ARGUMENT

I. Background Of the Case

In June and July 1982, two national banks, Union Planters National Bank of Memphis and Security Pacific National Bank (California), applied to the defendant, Comptroller of the Currency, for permission to own discount brokerage subsidiaries. In the case of Union Planters, the ownership was to come about by means of acquiring a going concern, Brenner Steed and Associates, Inc. In the case of Security Pacific, the intent was to establish a de novo discount brokerage subsidiary. A "discount broker" is known as such because of the low commissions it charges. It "can afford to charge lower commissions than full service brokerage firms because it does not provide investment advice or analysis, but merely executes the purchase and sell orders placed by its customers." *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 82 L. Ed. 158, 162 n.

2 (1984). Both applications indicated an intention, eventually, to operate the discount brokerage subsidiaries at locations other than the main office and authorized branch offices of the respective parent banks, including locations outside the state in which the respective parent banks are located. In August and September, 1982, the Comptroller approved the two applications.

The Respondent trade association, fearing competitive injury to its members, filed suit challenging the Comptroller's approvals as being in violation of the Glass-Steagall Act and the McFadden Act. On November 2, 1983, Judge Flannery handed down a decision, *Securities Industry Association v. Comptroller of the Currency,* 577 F. Supp. 252 (D.D.C. 1983), in which he held that "the Glass-Steagall Act does not prohibit the ownership and operation by national banks of subsidiaries engaged in the brokerage business." *Id.* at 257.[1] However, the Court went on to hold "that an office of a national bank for the conduct of discount brokerage activities is a 'branch' within the definition of Section 36 (f) of the McFadden Act, subject to state law restrictions on the establishment of bank branch offices." *Id.* at 260.

The U.S. Court of Appeals affirmed the decision of the District Court "generally for the reasons stated in its Memorandum Opinion." *Securities Industry Association v. Comptroller of the Currency,* 758 F.2d 739, 740 (D.C. Cir. 1985). Rehearing en banc was

[1]This portion of the decision of the lower courts is subject to a separate Petition for Writ of Certiorari now pending before this Court, *Securities Industry Association v. Comptroller of the Currency, petition for cert. filed,* 54 U.S.L.W. 3170 (U.S. Sept. 9, 1985) (No. 85-392).

refused, 765 F.2d 1196 (D.C. Cir. 1985). Petitions for Writs of Certiorari were filed by the Comptroller of the Currency and by the Intervenor, Security Pacific National Bank, on December 9, 1985.

II. Reasons For Granting The Petitions For Writ Of Certiorari

A. This Case Presents An Important Question Of Federal Law Which Has Not Been Decided By The Supreme Court, But Should Be.

In the decision of the District Court (in essence adopted by the Court of Appeals), Judge Flannery relied extensively upon the post-passage comments of Representative McFadden in which the Congressman maintained that "[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting *any* business carried on at the main office is a branch." 68 Cong. Rec. 5,816 (1927) (emphasis supplied). If that is to be the definitive interpretation of a statute which defines "branch" to include a place of business at which the deposit receiving, money lending, and check paying functions are performed (and which manifestly does *not* say that a "branch" is a place where *any* business is transacted), then the implications of the court's conclusion far exceed the bounds of this case, which pertains only to the operation of discount brokerage offices of national banks. In addition to the many such offices now in existence, or anticipated, operated or to be operated by the two banks immediately involved in this case and by many other national banks, the fact of the matter is that national banks now maintain a variety of off-premises facilities at which they trans-

act *some* business, though not any of the three functions set forth in the statutory definition.

As the Comptroller of the Currency pointed out in his decision on the application of Security Pacific to establish a discount brokerage facility, "[a] number of banks currently operat[e] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra-state and interstate basis." Petition for Certiorari, Appendix D at 44a, *Clarke v. Securities Industry Association,* No. 85-971 (U.S. Dec. 9, 1985).

In addition, the Comptroller also describes the practice of "a number of banks" in maintaining non-branch facilities for "record custody and the clearing and settlement of transactions," ministerial and clerical functions not involving direct dealing with the public. *Id.*

National banks also operate "loan production offices," both interstate and intrastate,[2] with the approval of the Comptroller. A loan production office is a place from which agents or employees of a national bank may originate loans, provided that the loans so originated are actually approved and made at the main office or a branch office of the bank (12 C.F.R. § 7.7380 (1985)).

[2]We are unaware of any published reports revealing the current number of loan production offices (LPO's) operated by national banks, but there were already approximately 350 in 1978. *See* Rubenstein, *IBAA Plans Suit to Force End of Loan Production Offices,* American Banker, May 8, 1978, at 1, 44. The threatened lawsuit to which this article refers was filed but was ultimately unsuccessful. The District of Columbia Circuit held the suit to be barred by laches, so it did not officially reach the merits of the case. Nevertheless, in a long footnote to the opinion, the court indicated its belief that the LPO's were legal because they did not perform any of the three enumerated functions of a "branch." *Independent Bankers Association of America v. Heimann,* 627 F.2d 486, 488 (D.C. Cir. 1980). It is impossible to reconcile that reasoning with the decision at issue here, though both cases were decided by the same court.

National banks (as well as state banks) also transact business with their customers through electronic devices commonly known as automated teller machines or ATM's, often owned and operated by parties other than the bank or banks themselves, often shared with other financial institutions. There are hundreds of shared ATM networks involving thousands of financial institutions and thousands of ATM's.[3] The Second Circuit has concluded that such devices do not constitute "branches" within the meaning of the McFadden Act. *Independent Bankers Association of New York State v. Marine Midland Bank,* 757 F.2d 453 (2d Cir. 1985), *petition for cert. filed* 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023).

The legitimacy of all off-premises facilities of national banks must necessarily be called into serious question if the McFadden Act's branching restrictions are to be applied to *any* business transacted. The language of the statute itself does not require that result, and this Court has never so held. As we indicated above, this Court has held only that the performance of one or more of the three statutorily enumerated functions defines the minimum content of the term "branch" *may* include more. *First National*

[3]Felgran, *Shared ATM Networks: Market Structure and Public Policy,* New England Economic Review, Jan.-Feb. 1984 at 23, 28-29.

Bank in Plant City v. Dickinson, 396 U.S. at 135. Whether it actually does include more, and, if so, what that might be, remain unanswered and too often litigated questions which ought to be resolved by this Court.

B. The Issue Presented Here Was Wrongly Decided By The Court Below.

In granting controlling importance to the post-passage remarks of Representative McFadden discussed above, the court of appeals (by adopting the reasoning of the district court) ignored the factual history surrounding the passage of the McFadden Act in favor of an expression of opinion by a single Congressman. The factual history, however, manifestly shows that the object of the legislation was to expand rather than contract the opportunity of national banks to serve their customers.

As early as at least 1911, the Attorney General of the United States had concluded that national banks were not authorized by statute to operate branch banks. 298 Op. Att'y Gen. 81, 98 (1911). This Court reached the same result in *First National Bank in St. Louis v. Missouri,* 263 U.S. 640 (1924). Nevertheless, the Attorney General distinguished between full-fledged branch offices and "additional offices" or "tellers windows" which performed routine services such as the receipt of deposits and the cashing of checks. While "branches" were illegal, "additional offices" were not. 34 Op. Att'y Gen. 1 (1923). The inability of national banks to operate full service branches, at least in states where state chartered banks were permitted to do so, left national banks at a competitive disadvantage, and their ability to utilize "additional offices" was insufficient to remedy

that disadvantage. 66 Cong. Rec. 4,432 (1925) (Statement of Senator Pepper, chief Senate sponsor of the McFadden Act).

Additional "offices" of national banks, which were nevertheless not "branches," preexisted the McFadden Act and were not intended to be outlawed by the McFadden Act.

The McFadden Act was discussed and debated in Congress for three years before its passage. In all of that time, there is no evidence to be found that Congress intended to require that all of the business of national banks be conducted at main offices and authorized branch offices. Indeed, the only contemporaneous reference to be found to the effect that a place other than a main office for the transaction of any business constitutes a "branch" is the ambiguous statement of Congressman McFadden mentioned above. That single piece of legislative history should be disregarded entirely. Not only was the statement made after the law was passed, but it was also a statement that was simply inserted into the Congressional Record as an "extension of remarks" ten days after Congress adjourned (68 Cong. Rec. 5,969, 5,974 (daily ed., March 14, 1927)), leaving no real opportunity for other Congressmen or Senators to state a contrary understanding of the law. Sponsor or not, Congressman McFadden was only one Congressman. When we seek to discover the intent of the legislature, we must look to the intent of all of the Congress or of the majority voting for the bill. This Court has held that the "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before passage."

Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974).

The post-passage history of the McFadden Act is instructive in one respect, however. During and before 1927, a number of commercial banks, including national banks, owned full-fledged securities firms, operated as subsidiaries of the banks and maintaining offices in states other than the home state of the parent bank. The passage of the McFadden Act in that year had absolutely no effect upon the business locations of the banks' securities affiliates or subsidiaries. They continued their activities, unchallenged and uninterrupted until passage of the Glass-Steagall Act in 1933. *See* Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3d Sess. 1056-57 (1931). Glass-Steagall, of course, made unlawful the affiliation of full-fledged securities firms as such and national banks—without regard for the location of the respective offices of the affiliated businesses. If it had been intended that the offices of a bank's securities affiliates would be included within the definition of "branch," it is, to say the least, odd that none of the contemporaneous Congressmen, Senators, regulators or competitors of the banks seem to have raised the issue during the entire period from 1924 to 1934 when the Glass-Steagall Act went into effect and substantially mooted the question. As this Court has recently indicated, in another context, the universal behavior of entities regulated by an Act, after its passage, though it is not conclusive, at least supports the view that the Act actually means what they understand it to mean. *See Securities Industry Association v. Board of Governors of the Federal Reserve System*, 82 L. Ed. 2d 107, 124 (1984).

CONCLUSION

For the reasons stated herein, the American Bankers Association respectfully maintains that (in the absence of new legislation) only plenary consideration by this Court of the important issues surrounding interpretation of the McFadden Act, now nearly sixty years old, can provide the necessary guidance to our members and other interested parties in the conduct of the modern banking business. The Petitions for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Associate General Counsel-Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-4240
Attorneys for Amicus Curiae

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ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE

ROBERT S. RIFKIND
(Counsel of Record)
STEPHEN S. MADSEN
ELIZABETH S. STONG
One Chase Manhattan Plaza,
New York, N.Y. 10005
(212) 422-3000

Attorneys for The New York Clearing House Association as Amicus Curiae

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza,
New York, N.Y. 10005

Of Counsel.

February 8, 1986

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ON PETITIONS FOR WRITS OF CERTIORARI
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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The New York Clearing House Association (the "Clearing House") is an association of 12 leading commercial banks that are located in New York City.[1] It operates electronic payment

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA and European American Bank & Trust Company.

systems and clears commercial drafts and items in the New York area. In addition, it files briefs as amicus curiae in appeals that raise significant questions of banking law. The Clearing House appeared as amicus curiae before the Court of Appeals for the District of Columbia Circuit and the District Court for the District of Columbia in this action.

Members of the Clearing House have a direct and vital interest in the proper interpretation of Federal banking statutes such as the McFadden Act. The Clearing House believes that petitioner Comptroller of the Currency (the "Comptroller") properly exercised his authority under the Act in permitting petitioner Security Pacific National Bank to establish, and Union Planters National Bank to acquire, subsidiaries which provide discount brokerage services to the public at sites not limited to bank branches. The Clearing House further believes that the views presented in this brief will aid the Court in its consideration of the issues arising under the McFadden Act.

SUMMARY OF ARGUMENT

The Supreme Court should grant the petitions for certiorari submitted by the Comptroller of the Currency and Security Pacific National Bank because the decisions below (1) have the practical effect of substantially expanding the scope of the McFadden Act to constrain activities that may be, and long have been, conducted without locational restrictions; (2) construe the Act in a fashion that runs athwart the national policy in favor of competition and rules of statutory interpretation established by this Court; and (3) replace the statutory definition of "branch" with an open-ended definition inviting regulation-by-litigation at the instigation of virtually any enterprise perceiving itself to be adversely affected by competition with banks.

ARGUMENT

I

This case presents an issue of major importance to the banking industry and the national economy. For many decades national banks have engaged in two different types of activities: those activities that may be conducted only at bank headquarters or branches, and those that may be conducted at any location. The former category of activities, as specified by the McFadden Act, 12 U.S.C. § 36(f)(1982), consists of taking deposits, paying checks and lending money. The latter category includes a wide array of legitimate and useful activities that national banks have long conducted without locational constraint including, *inter alia,* trust account administration, credit card operations, loan production, and, more recently, securities brokerage. The distinction between these two categories has long been implemented by the Comptroller of the Currency,[2] relied on by banks, and acknowledged by Congress.[3]

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[2] *See* 12 C.F.R. §§ 5.30(a), 7.7380(b) (1985).

[3] The substantial, multistate, non-branch activity of national banks was expressly considered and relied upon by Congress during the three years of hearings leading to the passage in 1978 of the International Banking Act, Pub. L. No. 369, 92 Stat. 607, which amended the National Banking Act and other banking statutes to accommodate the activities of foreign banks. *See, e.g., Financial Institutions and the Nation's Economy: (FINE) Discussion Principles: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Banking, Currency and Housing Committee,* Part 1, 94th Cong., 1st Sess. & 2nd Sess. 1245-1249 (1975); *id.,* Part 3 at 1834 (1976); *Foreign Bank Act of 1975: Hearing Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. 154-56, 234, 370-72, 433, 509-10 (1976); *International Banking Act of 1976: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. 162-64, 169-70, 258-59 (1976); *International Banking Act of 1977: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Finance and Urban Affairs,* 95th Cong., 1st Sess. 301, 311-33, 473-74, 556, 576, 607-08 (1977); *International Banking Act of 1978: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs,* 95th Cong., 2d Sess. 99, 144, 198-200 (1978); *International Banking Act of 1978: Report of the Senate Committee on Banking, Housing, and Urban Affairs,* 95th Cong., 2d Sess. 8-11 (1978).

The decisions below are of grave consequence because they blur that well-settled distinction, threatening to swallow up the latter category into the former and raising serious doubt as to numerous bank operations long conducted at places other than bank headquarters and branch offices. The decisions below leave in disarray a long-standing statutory arrangement and will have a serious *in terrorem* effect on on-going activities. Moreover, in doing so, they adopt a rule of standing-to-sue that invites a torrent of litigation initiated not only by the intended beneficiaries of the McFadden Act (*i.e.*, other banks) but by any enterprise that can claim to be economically affected by any bank activity conducted at any place other than headquarters or branches.

The McFadden Act provides that any national bank may establish branch offices in the state in which it is located to the extent that "such establishment and operation are at the time authorized to State banks by the statute law of the State in question", 12 U.S.C. § 36(c)(2)(1982). Section 7(f) of the McFadden Act, 12 U.S.C. § 36(f)(1982), defines "branch" as follows:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

At issue here is the proper scope of the definition of "branch".

The Comptroller determined that offices at which discount securities brokerage is conducted by banks are not, as such, bank branches within the meaning of the McFadden Act because they are not offices at which any of the three types of transactions specified by the Act—*i.e.*, receiving deposits, paying checks or lending money—occur.

The district court redefined the term "branch" to encompass any location conducting any activity "aimed at attracting and servicing customers conveniently", 577 F. Supp. 252, 260.

The court of appeals affirmed the ruling of the district court, by a 2-1 vote, in a two-sentence opinion, stating that it was in agreement with the result reached "generally for the reasons stated" by the district court. 758 F.2d 739, 740. Suggestion for rehearing *en banc* was denied, over the dissent of three judges, on July 12, 1985.

The district court rejected the Comptroller's "literal reading of the statute", 577 F. Supp. at 259, primarily on grounds that it was "contradicted . . . by the legislative history of the Act", *id.* This Court has recently cautioned, however, in a related context, that the banking statutes are to be read in accordance with their terms and that policy decisions to alter those terms should be left to Congress. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 54 U.S.L.W. 4101 (U.S. January 22, 1986) (No. 84-1274). Moreover, the legislative history on which the district court relied was comprised entirely of one post-enactment statement by Representative McFadden. As this Court observed in *Dimension Financial*, matter extrinsic to the legislative debate, even when made a part of the formal record before Congress, "is not 'legislative history' in any meaningful sense of the term and cannot defeat the plain application of the words actually chosen by Congress to effectuate its will." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 54 U.S.L.W. 4101, 4104 (U.S. January 22, 1986) (No. 84-1274); *see Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) ("post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage").

In support of its position, the district court also cited a decision of this Court, *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), and of the District of Columbia Circuit, *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). Those decisions, however, hold that certain off-premises banking facilities were bank branches precisely be-

cause they performed one of the three enumerated banking functions specified in Section 7(f) of the McFadden Act.[4]

II

This action is the most recent battle in a long campaign by the securities industry to insulate itself from competition with commercial banks. Despite that campaign, it is now finally established that national banks and bank affiliates may offer brokerage services to the public. *Securities Industry Association v. Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 54 U.S.L.W. 3450 (U.S. January 13, 1986) (No. 85-392); *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 104 S. Ct. 3003 (1984). Yet the decisions below largely emasculate the ability of national banks to engage effectively in that business.

Until 1975, brokerage commission and exchange membership rules severely impeded the ability of banks to execute customers' orders for listed securities. Those rules barred corporations, and thus all federally insured banks, from exchange membership, *see* 2 L. Loss, *Securities Regulation* 1172 n.8 (2d ed. 1961), and fixed the commissions to be charged by brokers who were exchange members, *see, e.g.*, New York Stock Exchange, Former Rule 383; SEC, *Report of Special Study of Securities Markets*, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2 at 295 (1963). As a result, banks—obliged to execute transactions in listed securities through

[4] The district court also relied upon *St. Louis County National Bank v. Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977). We believe that the result reached in *St. Louis County* is mistaken for the reasons stated in the dissenting opinion therein, 548 F.2d at 720-22, and in *Continental Illinois National Bank & Trust Co. v. Lignoul*, No. 76-C-2209 (N.D. Ill. November 9, 1976). In any event, *St. Louis County* was an action by a state bank against a national bank, and the court there acknowledged and sought to serve the Congressional purpose of placing "national and state banks on a basis of 'competitive equality' ", 548 F.2d at 718, insofar as bank branching was concerned. The decisions below serve no such purpose.

exchange members who charged fixed commissions—were unable to offer brokerage services at competitive prices and did not aggressively promote their brokerage services.[5]

Banks began to expand their brokerage operations following the deregulation of brokerage commission, which became fully effective in 1975, *see* Securities Act Amendments of 1975, 15 U.S.C. § 78f(e)(1)(1982), and they have offered an increasing variety of brokerage and related services since then.[6] In response, the SIA urged the bank affiliates were excluded from engaging in discount brokerage activity by the Glass-Steagall Act, Pub. L. No. 66, 48 Stat. 162 (1933), and the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.* (1982). Those arguments were rejected by this Court in *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 104 S. Ct. 3003 (1984). The SIA next argued, in this action, that the Glass-Steagall Act prohibits banks, as opposed to bank affiliates, from offering discount brokerage services to their customers. That position was rejected by the courts below. The SIA's petition for writ of certiorari on so much of the decisions below as held that the Glass-Steagall Act permits banks to engage in discount brokerage was denied by this Court on January 13, 1986. *Securities Industry Association v. Comptroller of the Currency*, 54 U.S.L.W. 3450 (U.S. January 13, 1986) (No. 85-392).

Denied protection from competition under the Bank Holding Company Act and the Glass-Steagall Act, the SIA sought shelter from competition under the branch banking provisions

[5] Banks were in the business nonetheless. As this Court has recently recognized, banks "long have arranged the purchase and sale of securities as an accommodation to their customers" and they have in fact executed securities transactions in precisely the same manner as other brokers do. *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 104 S. Ct. 3003, 3008 (1984).

[6] *See generally*, Clark & Saunders, *Glass-Steagall Revised: The Impact on Banks, Capital Markets and the Small Investor*, 97 Banking L.J. 811, 829-31 (1980); Note, *A Banker's Adventures in Brokerland: Looking Through Glass-Steagall at Discount Brokerage Services*, 81 Mich. L. Rev. 1498 (1983).

of the McFadden Act. Thus, the SIA urges that, if banks are permitted to engage in discount brokerage, they can only do so under the handicap of locational restrictions, so that competition in the brokerage business will be held to a minimum. In particular, the SIA urges that national banks can engage in discount brokerage of securities only at their headquarters and branch offices. That interpretation of the Act substantially and arbitrarily curtails the procompetitive effect of this Court's recent decision in *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 104 S. Ct. 3003 (1984), and casts doubt upon a wide range of other activities long conducted by banks at locations other than their headquarters and branches.

We submit that the courts below fell into error by ignoring the fundamental national policy in favor of vigorous and unhampered competition. That policy is predicated upon the firm belief that the public benefits from competition and is disadvantaged by restraints on competition. As Congress long ago established, preserving the rule of competition *is* the declared public policy of the United States. 15 U.S.C. §§ 1-7 (1982). This Court has stated:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise laid open to question, the policy unequivocally laid down by the Act is competition." *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4 (1958).

Clear recognition of that policy has given rise to rules of statutory construction and interpretation that were entirely ignored by the courts below. As this Court has held, statutory

exceptions to the rule of competition must be both explicit and narrowly construed. *See United States v. National Association of Securities Dealers,* 422 U.S. 694, 719-20 (1975); *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 218 (1966); *United States v. Philadelphia National Bank,* 374 U.S. 321, 350-51 n.2[illegible] (1963).[7]

The courts below wholly disregarded this fundamental doctrine, finding in the McFadden Act competitive constraints neither intended nor expressed by Congress. Nowhere in the language of the Act are there to be found constraints of the sort here invoked. The plain language of the Act defines a "branch"—to which the locational restrictions of the Act apply—to

> "include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which *deposits are received, or checks paid, or money lent*", 12 U.S.C. § 36(f)(1982) (emphasis supplied).

Nothing in the language of the Act suggests that the locational restraints apply to offices, agencies or any other facility at which none of the three designated types of transactions occurs. Discount brokerage offices perform none of the enumerated functions, nor engage in activities even arguably akin to those functions.[8]

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[7] We fully recognize that, in some areas of the banking business, Congress has elected to sacrifice competition to other purposes. *Investment Company Institute v. Camp,* 401 U.S. 617, 635-36 (1971). But exceptions to the rule of competition are not to be read more broadly than required by the express language Congress adopted. *See Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726, 733 (1973); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973).

[8] Indeed, the remoteness of discount brokerage from the fair intendment of the Act is demonstrated by the very cases on which the district court relied. In *First National Bank in Plant City v. Dickinson,* 396 U.S. 122 (1969), this Court found that off-premises depository facilities operated by a bank were bank branches because they performed functions substantially identical to the receiving of deposits "for all purposes contemplated by Congress", 396 U.S.

The purpose of the McFadden Act was to facilitate competition among state and national banks and not to restrain competition between banks and brokerage firms. Prior to the passage of the McFadden Act, a national bank was prohibited from conducting its banking business at any place other than the office specified in its certificate of organization. *First National Bank in St. Louis v. Missouri,* 263 U.S. 640 (1924). This placed national banks at a sharp disadvantage in competing with state-chartered banks in those states where branching was permitted. The McFadden Act redressed this competitive inequality by granting national banks the same branching privileges, if any, afforded to state banks by state law. *First National Bank in Plant City v. Dickinson,* 396 U.S. 122 (1969); *see* R. Westerfield, *Banking Principles and Practice* 249-51 (rev. ed. 1928).

There is no room for doubt as to the anticompetitive impact of the interpretation adopted below. As the district court expressly found:

> " . . . SIA has alleged that *its members' profits will suffer* if national banks are allowed to operate brokerage subsidiaries in competition with them. And it is obvious that the greater number of offices from which banks are allowed to conduct their brokerage business, *the greater will be the inroads the banks will be able to make* into the business of SIA's members." 577 F. Supp. at 258 (emphasis supplied).

Inroads can be made into "the business of SIA's members" only by attracting customers with competitive prices and services. But the salutary function of competition in our economy is

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at 137. Similarly, in *Independent Bankers Association of America v. Smith,* 534 F.2d 921 (D.C.Cir.), *cert. denied,* 429 U.S. 862 (1976), the court found that each of the three enumerated functions—receiving deposits, paying checks and making loans—were performed at the bank's customer-bank communications terminals, bringing the terminals within the statutory definition of a branch.

precisely that it affords choices to customers and thereby constrains profits by driving down prices and threatening the erosion of market shares.

The restriction of such competition as commercial banks may provide in the area of discount brokerage services should not be countenanced absent express Congressional proscription. The branching provisions of the McFadden Act clearly do not contain such a proscription, and the language of the Act should not be strained to provide one.

III

Disregarding the language and purpose of the Act, the ruling of the Comptroller, and well-established law on standing, the decisions below adopted an open-ended approach under which a wide array of bank activities could be challenged by virtually anyone claiming to be economically injured by bank activity. Eschewing "the Comptroller's literal reading of the statute", 577 F. Supp. at 259, the district court found the term "branch" to embrace not only any location "at which deposits are received, or checks paid, or money lent", 12 U.S.C. § 36(f)(1982), but more broadly, any location where a bank conducts any activity "aimed at attracting and servicing customers conveniently", 577 F. Supp. at 260. That holding would cast a cloud over a wide range of useful and legitimate activities. Many activities of banks, in addition to discount securities brokerage, are conducted away from the bank's headquarters and branches—for example, loan production, trust account administration, processing of consumer and commercial loans, and credit card operations. While such activities inevitably have as their ultimate object the servicing and convenience of customers, it has never been supposed that locations at which they are conducted are "branches". The indeterminate nature of the definition adopted below would create a regulatory mare's nest.

The problems generated by the open-ended definition of "branch" are exacerbated by the overbroad view of standing

adopted below. The decisions below endorse a rule of standing-to-sue that permits anyone to bring suit if aggrieved by "the scope of national banks' activities", 577 F. Supp. at 258. That rule is inconsistent with prior decisions of this Court. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982), *quoting Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). Moreover, it constitutes an invitation issued to anyone and everyone with a pecuniary interest in obstructing bank operations. The response to that invitation may reasonably be expected to overwhelm the systematic regulation of bank branching by the Comptroller envisioned by Congress. Banks will be confronted with the prospect of persistent uncertainty as to the legitimacy of their activities. The quest for protection from bank competition by parties who were never intended by Congress to enjoy any shelter under the McFadden Act will have a significant *in terrorem* effect on perfectly legitimate economic activities while gratuitously burdening both banks and the courts.

The indeterminate redefinition of "branch" adopted by the courts below is inconsistent with the plain meaning and the legislative history of the McFadden Act and cannot be justified by either the post-enactment statements of Representative McFadden or the decisions cited by the courts below. It is, nonetheless, only a foretaste of a long and unhappy campaign of regulation-by-litigation if the decisions below are allowed to stand.

CONCLUSION

Nothing in the McFadden Act warrants the judicial reconstruction of the statutory definition of a "branch" undertaken by the courts below. Nothing in the McFadden Act requires the protection of the business of the SIA membership from competitive "inroads". For the reasons stated above, the petitions for writs of certiorari should be granted.

Respectfully submitted,

ROBERT S. RIFKIND
STEPHEN S. MADSEN
ELIZABETH S. STONG
One Chase Manhattan Plaza,
New York, N.Y. 10005
(212) 422-3000

Attorneys for The New York Clearing House Association as Amicus Curiae

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza,
New York, N.Y. 10005

Of Counsel.

February 8, 1986

(6) (7)

Nos. 85-971, 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

Of Counsel:
EDWARD J. MCANIFF
FREDERICK B. MCLANE
O'MELVENY & MYERS
400 S. Hope Street
Los Angeles, California 90071

RUSSELL A. FREEMAN
SECURITY PACIFIC NATIONAL BANK
333 S. Hope Street (H54)
Los Angeles, California 90071

ARTHUR A. FRITZ
SPC SECURITIES SERVICES CORP.
333 S. Hope Street (H23-80)
Los Angeles, California 90071

WILLIAM T. COLEMAN, JR.
Counsel of Record
MARK WOOD
JOHN H. BEISNER
JACOB M. LEWIS
STUART A. STREICHLER
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

5/PW

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

To preserve the competitive equality of national banks and state banks, the McFadden Act allows national banks to establish "branches," defined "to include any . . . office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent," but only in a bank's home state and only to the extent allowed by that state's laws governing the location of state bank branches. 12 U.S.C. § 36(c), (f). The operation of other national bank facilities not within this definition, however, is not similarly restricted. In the case at bar, a divided court of appeals, overturning a ruling by the Comptroller of the Currency ("Comptroller"), held that national bank discount brokerage offices not engaged in receiving deposits, paying checks, or lending money are nevertheless branches and therefore could be operated only in the bank's home state and only at its main office and branches. Further, the court held that an organization of non-banks has standing to seek enforcement of the McFadden Act's branching restrictions. Thus, the questions presented are:

(1) Did the Comptroller act lawfully in ruling that a national bank may establish an interstate discount brokerage operation without violating the branch banking restrictions of the McFadden Act?

(2) Does an association having no connection with national or state banks fall outside the zone of interests the McFadden Act was intended to protect and therefore lack standing to seek enforcement of the Act?

PARTIES TO THE PROCEEDINGS

Petitioner in No. 85-971 is Robert L. Clarke, Comptroller of the Currency of the United States. Petitioner in No. 85-972 is Security Pacific National Bank, an intervenor below.* Respondent in both cases is the Securities Industry Association, a trade association of non-bank securities brokers, dealers, and underwriters.

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*As required by Rule 28.1 of this Court, petitioner Security Pacific National Bank states that its parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates consist of Security Pacific Corporation, Century Credit Corporation, Hoare Govett Ltd., Security Pacific Bank S.A., Tricontinental Holdings Ltd., Marac Holdings Ltd., Guaranty Trust Ltd., Caixa Leasing S.A., Security Pacific Leasing S.A., TMG Investment Pte. Ltd., Pan Pacific Ventures, Inc., SECPRO S.A., SPAL Management Ltd., Atlantic Century Advisors, Inc., Munder Capital Management, Inc. and Hong Kong & Shanghai Insurance Co., Ltd.

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit and an opinion dissenting therefrom are reported at 758 F.2d 739 (D.C. Cir. 1985), and are reprinted in Appendix ("App.") A to the Petition of Security Pacific National Bank for a Writ of Certiorari (1a).[1] The District

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[1] The Solicitor General has filed a consent motion seeking leave of this Court to dispense with the filing of a joint appendix. Relevant

Court's decision is reported at 577 F. Supp. 252 (D.D.C. 1983), and is reprinted as App. B (4a). The decision of the Comptroller of the Currency approving Security Pacific National Bank's application to establish a discount brokerage subsidiary is reported at [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284 (Aug. 26, 1982), and is reprinted as App. C (22a). The court of appeals order denying the suggestions for rehearing *en banc*, along with the dissenting opinion of three judges, is reported at 765 F.2d 1196 (D.C. Cir. 1985), and is reprinted as App. E (38a).

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on April 12, 1985. Petitioners' suggestions for rehearing *en banc* were denied on July 12, 1985. On October 1, 1985, the Chief Justice entered an order extending petitioners' time for filing petitions for writs of certiorari to November 9, 1985. On November 6, 1985, the Chief Justice signed an order further extending petitioners' time for filing to December 9, 1985. The petitions for writs of certiorari were filed on that date and were granted on March 3, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 36(c) (1982):

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said associa-

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opinions and other portions of the record below were included in the Appendices to the Petition of Security Pacific National Bank for a Writ of Certiorari filed on December 9, 1985. Citations to material printed in that Appendix appear as "—— a."

> tion is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

12 U.S.C. § 36(f) (1982):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 81 (1982):

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

United States Constitution, art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;— between Citizens of different States;—between Citizens of the same State

claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

In 1975, various aspects of the securities brokerage industry were deregulated, prompting banking institutions to consider expanded entry into that market.[2] *See generally* Wigder & Rigler, *Banks and the Discount Brokerage Business*, 18 Rev. Sec. & Commodities Reg. 81 (1985). In response to increased brokerage activity by banking institutions, respondent Securities Industry Association ("SIA"), a trade association of non-bank securities firms, has mounted a multi-pronged effort to block competition from the banking industry. In 1983, SIA filed a lawsuit contending that bank holding companies were not authorized by Congress to engage in discount brokerage, a challenge this Court ultimately rejected less than two years ago in *Securities Industry Association v. Board of Governors* ("*Schwab*"), 468 U.S. 207, 221 (1984).[3] Notwithstanding that defeat, SIA seeks in this litigation to prevent national banks (as distinct from bank holding companies) from entering the interstate discount brokerage market. As explained more fully below, SIA urges that the McFadden Act's branching restrictions should be applied to national bank discount brokerage operations, allowing each national bank to maintain discount brokerage offices only in its home state at its main office and branches. In short, if SIA prevails here, national banks would be prevented from establishing discount brokerage offices on an interstate basis.[4]

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[2] Securities brokerage involves the purchase and sale of securities for third parties.

[3] "Full-service" brokers provide investment advice in conjunction with brokerage; "discount brokers," who charge a lower commission, generally do not. Many of SIA's members are full-service brokers.

[4] Because discount brokerage affiliates of bank holding companies are not "banks" as defined by the Bank Holding Company Act of 1956, *see* 12 U.S.C. § 1841(c) (1982), they are not subject to that Act's limitations on interstate banking. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 47-48 & n.13 (1980) (interpreting 12 U.S.C. § 1842(d)). As a result, some discount brokerage affiliates of bank holding companies are now operating numerous offices nationwide. For example, as of December 31, 1985, BankAmerica Corporation's Charles Schwab & Company subsidiary had 90 discount brokerage offices in 29 states, the District of Columbia, and Hong Kong. *See* SEC Form B-D, Schedule E (Broker-Dealer Registration Statements). For some banking institutions, however, conducting discount brokerage activities through a national bank (as opposed to a bank holding company) has distinct advantages. This is particularly true for small and medium-size national banks for which the costs of establishing a holding company may be prohibitive.

A. The Comptroller's Approval Of Security Pacific's Application.

On July 2, 1982, petitioner Security Pacific National Bank ("Security Pacific") filed an application with the Comptroller of the Currency ("Comptroller") to establish a wholly-owned operating subsidiary ("Discount Brokerage") that would purchase securities for customers at rates much lower than those of full-service competitors. Security Pacific proposed to offer such services not only at its branch banks in its home state of California but also at other locations both inside and outside that state.

On August 26, 1982, the Comptroller issued a decision approving Security Pacific's application. (22a.) The Comptroller first concluded that the Glass-Steagall Act, particularly 12 U.S.C. § 24 (Seventh), provided "clear authorization for banks and . . . their operating subsidiaries . . . to engage in the activities contemplated for Discount Brokerage." (23a.) The Comptroller then separately examined whether, under the McFadden Act, the discount brokerage offices would constitute "branches" that could be located only within Security Pacific's home state at the bank's main office and existing branch banks. (29a-35a). Noting that the Act defines "branch" to include a facility at which "deposits are received, or checks paid, or money lent," *see* 12 U.S.C. § 36(f) (1982), the Comp-

troller concluded that the discount brokerage firms would perform none of these functions.

Although this conclusion would have sufficed to establish that Security Pacific's operation of these offices away from its main office and branches would not violate the Act, the Comptroller also concluded that even under arguable alternative readings of Section 36(f), the offices "could [not] be found . . . to be branches within the meaning of the McFadden Act." (33a) (citing *St. Louis County National Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977)). He further observed that it would be inconsistent with settled practice in the banking industry to find that offices conducting brokerage activities are within the McFadden Act's branch definition because a substantial "number of banks currently operat[e] [similar] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intrastate and interstate basis." (34a.) The Comptroller thereupon determined that "the activities of Discount Brokerage, viewed individually or collectively, . . . [did] not . . . constitute branch banking for purposes of the McFadden Act" and that Discount Brokerage's offices therefore could be established on an interstate basis. (35a.)[5]

Relying on the Comptroller's approval, Discount Brokerage has established twenty offices (including eighteen in nine states outside California) and presently maintains approximately 245,000 customer accounts (about 155,000 of which are held by persons residing outside California). Approximately sixty other national banks

[5] A month later, the Comptroller approved the application of Union Planters National Bank of Memphis ("Union Planters") to acquire an existing discount brokerage firm. (*See* App. D, 37a.)

have applied to create or acquire similar discount brokerage subsidiaries.

B. District Court Proceedings.

On October 6, 1982, SIA, a trade association of nonbank securities firms competing with Discount Brokerage, filed this action challenging the Comptroller's approval of the Security Pacific application.[6] SIA urged reversal of the Comptroller's action on the grounds that (1) the Glass-Steagall Act prohibits national bank subsidiaries from offering discount brokerage services at all and (2) in any event the McFadden Act prohibits Security Pacific from offering brokerage services at any location away from its main office and branches in California. On cross-motions for summary judgment, the United States District Court for the District of Columbia (Hon. Thomas A. Flannery) upheld the Comptroller's Glass-Steagall Act ruling. 577 F. Supp. at 254-57 (8a-14a). However, the court reversed the Comptroller's McFadden Act decision. *Id.* at 257-60 (14a-21a). The court first held that SIA had standing to seek enforcement of the Act's branching provisions, essentially finding that since SIA's members could be injured by the Comptroller's ruling, they are ipso facto within the zone of interests the Act was intended to protect. *Id.* at 258-259 (15a-17a). Then, concluding that a national bank facility performing any function which "national banks may conduct at their main office" is a "branch" under the Act, *id.* at 260 (20a), and finding that brokerage activities could as a physical matter be housed at a bank's main office, the court invalidated the Comptroller's approval to the extent that it authorized establishment of brokerage offices at any location outside California and at "unchartered locations" (*i.e.*, non-branch locations) in California. (App. F, 44a.)

[6] SIA also challenged the Comptroller's approval of the Union Planters application. *See supra* at 6 n.5.

C. Appellate Proceedings.

The parties cross-appealed to the United States Court of Appeals for the District of Columbia Circuit, but briefing was deferred because the Glass-Steagall Act issue closely resembled a question then pending before this Court in *Schwab*. After this Court held in *Schwab* that bank holding company affiliates are authorized by the Glass-Steagall Act to provide discount brokerage services, 468 U.S. at 221, the court of appeals issued a two-sentence *per curiam* opinion affirming the district court's conclusions "generally for the reasons stated in its Memorandum Opinion." 758 F.2d at 740 (2a). On the Glass-Steagall Act issue, the court of appeals was unanimous, noting that the district court ruling had "receive[d] substantial support" from *Schwab*.[7] *Id.* On the McFadden Act issue, however, the court divided. The majority affirmed without comment, but Judge Scalia dissented, stating that the district court's standing analysis had improperly "conflate[d] the constitutional requirement of injury in fact and the separate requirement that 'Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute.'" *Id.* (3a) (quoting *Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1090 (D.C. Cir.), *cert. denied*, 105 S. Ct. 509 (1984)). Further, Judge Scalia concluded that SIA lacked standing because only "state banks and possibly federal banks, but not all businesses injured in fact, . . . are within the zone of interests protected by the [Act's] branch banking restrictions." 758 F.2d at 740 (3a).

Security Pacific subsequently intervened and joined the Comptroller in seeking rehearing of the McFadden Act issue. On July 12, 1985, the court of appeals, voting 5-3, denied the suggestions for rehearing *en banc*. 765

[7] This Court denied SIA's petition for a writ of certiorari as to the Glass-Steagall Act ruling. *See Securities Indus. Ass'n v. Comptroller of the Currency*, 106 S. Ct. 790 (1986).

F.2d at 1196 (38a-39a). Judges Scalia, Bork and Starr, however, issued a vigorous dissent, stating that the majority's standing analysis improperly "discard[ed] the zone [of interests] test entirely." *Id.* at 1197 (41a). Further, the dissenters urged that the majority's view of the McFadden Act was "mistaken" and that the Comptroller's interpretation of the statute should have been upheld because it "cannot by any means be considered unreasonable." *Id.* at 1197-98 (41a-42a).

Discount Brokerage has continued to operate its non-branch offices both inside and outside of California pursuant to a stay issued by the district court. On July 25, 1985, SIA moved the court of appeals for an injunction that would have shut Discount Brokerage's eighteen offices outside of California, disrupting service of thousands of out-of-state accounts. On August 2, 1985, however, SIA's motion was denied. The court of appeals stayed issuance of its mandate pending the filing of a petition for writ of certiorari, and pursuant to Fed. R. App. P. 41(b), it remains stayed.

On December 9, 1985, the Comptroller and Security Pacific separately petitioned for writs of certiorari. On March 3, 1986, both petitions were granted, and the cases were consolidated. *See* 106 S. Ct. 1259 (1986).

SUMMARY OF ARGUMENT

This Court should uphold the Comptroller's ruling that national bank-operated discount brokerage offices are not branches under the McFadden Act (defining "branches" to be facilities "at which deposits are received, or checks paid, or money lent"), 12 U.S.C. § 36(f) (1982), and that such offices may therefore be established on an interstate basis. The lower courts' nullification of that decision at the behest of SIA, a group of non-bank securities firms seeking to insulate themselves from national bank competition, is erroneous because the Comp-

troller's decision was compelled by the plain language of Section 36(f) and, in any event, was not unreasonable.

If an agency's interpretation of a statute committed to its administration conforms to the law's "plain language" and there is no clearly expressed legislative intention to the contrary, a court should uphold that interpretation without further analysis. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Comptroller's view that Section 36(f) encompasses only those facilities engaged in receiving deposits, paying checks, or lending money was found by the lower courts to constitute the "literal reading of the statute." 577 F. Supp. at 259 (18a). Nevertheless, by adding language to Section 36(f) and thereby broadening its scope, the courts declared Security Pacific's discount brokerage offices to be branches even though they perform none of the functions enumerated in Section 36(f). Since the courts below identified no evidence of legislative intent in derogation of the statute's plain language, this rewriting of the statute was improper, *see, e.g., United States v. Albertini*, 105 S. Ct. 2897, 2902 (1985), and the Comptroller's decision should have been upheld.

Even if Section 36(f) were susceptible to more than one interpretation, the Comptroller's statutory exegesis was in all respects reasonable and therefore still should have been sustained. *Chevron*, 467 U.S. at 843-44. Not only is the Comptroller's decision amply justified by the language of Section 36(f), but it is also supported by all other indicia relevant to the narrow judicial review that should be afforded agency statutory interpretation.

First, the legislative history provides strong grounds for the Comptroller's decision. Congress enacted the McFadden Act in 1927 to preserve the "competitive equality" of national and state banks in their ability to operate branch banks. In so doing, Congress' sole concern was with banking activity (*i.e.*, the provision of money

and credit and the acceptance of deposits). Nowhere in the Act's three-year legislative history is it suggested that Section 36 was intended to limit the then long-standing authorization for national banks to engage in nonbanking functions at locations away from their main offices. Moreover, before the McFadden Act was passed, national banks commonly operated brokerage offices on an interstate basis. Section 2(b) of the McFadden Act, enacted simultaneously with Section 36, was intended to "affirm . . . the existence of [this] type of business." S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926). Thus, rather than restricting national banks' conduct of brokerage activities through interstate offices, the McFadden Act actually endorsed it. Further, only six years later, in legislating to curtail national bank securities activities and to amend the McFadden Act's branching provisions, Congress did not restrict interstate brokerage by national banks, even though it had full knowledge that the McFadden Act's bar on interstate branching was in practice not being applied to such activity. *See Securities Industry Association v. Board of Governors* ("*Schwab*"), 468 U.S. 207, 216-21 (1984) (interpreting Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377 (1982)). Congress thus ratified the view that the McFadden Act does not limit the location of brokerage offices. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983).

The Comptroller's decision also is supported by the "basic function" test developed by the federal courts as an aid in applying Section 36(f). Under that test, a national bank facility is deemed to be a branch only if (1) it provides one or more banking services of the nature enumerated in Section 36(f) and (2) its operation would upset the competitive balance between state and national banks as to such services. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 136-37 (1969). It is inconceivable that discount brokerage offices could be deemed branches under this test

because, although discount brokerage is "closely related to banking," it is at base a "*nonbanking* activity." *Schwab*, 468 U.S. at 210-11 (emphasis added). Additionally, the Comptroller's interpretation is consistent with his long-standing practice of authorizing national banks to provide non-banking services, such as government and municipal securities sales, at non-branch bank facilities outside a national bank's home state.

In light of these factors, the Comptroller's ruling cannot by any stretch be considered unreasonable. The same, however, cannot be said of the lower courts' construction of Section 36(f). The courts held that a facility operated by a national bank must be deemed a McFadden Act branch if any of its activities, regardless of their nature, physically "may [be] conduct[ed] at [the bank's] main office." 577 F. Supp. at 260 (20a). But this "main office" test renders the definition of "branch" superfluous. Any function that might be performed at a remote facility, by definition, physically "may [be] conduct[ed]" at the main office. The test thus transforms each and every national bank-operated facility, regardless of function, into a branch office. Had Congress intended this definition, it easily could have enacted it, but as stated previously, the statutory language, the legislative history and years of judicial and administrative precedent oppose such a sweeping interpretation of Section 36(f). The construction of the courts below is premised entirely on a brief post-enactment remark inserted into the legislative record after Congress had adjourned. Such a statement is "not 'legislative history' in any meaningful sense of the term" and is thus entitled to no weight. *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 688 (1986).

The lower courts also erred in even reaching the merits of this case because plaintiff SIA lacks standing to seek enforcement of the McFadden Act's branching provisions. As noted above, the Act was intended to protect the "competitive equality" of national and state banks

with respect to branching. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). Thus, only national and state banks are within the zone of interests protected by the Act. Congress never intended non-banks, such as SIA's members, to be able to invoke the strictures of the Act to insulate themselves from competition by national banks.

ARGUMENT

Before Congress enacted the National Bank Act Amendments of 1927 (the "McFadden Act"), ch. 191, 44 Stat. 1224, a national bank was generally prohibited from conducting banking functions at locations away from its main office. *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924). In contrast, many state banks were not similarly restrained. Some states allowed their banks to establish branches wherever certain prerequisites were met, others allowed each bank to operate only a specified number, and some states allowed no branching at all. As discussed further below, *see infra* at 20-21, concern arose that allowing state banks in some jurisdictions to engage in "unlimited branch banking" while prohibiting national bank branching in those jurisdictions might cause "the eventual destruction of the national banking system." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966) (citation omitted). Congress therefore adopted the McFadden Act, granting national banks the right to establish branches and thereby "protect[ing them] from the unrestricted branch bank competition of state banks." *First National Bank in Plant City v. Dickinson* ("*Plant City*"), 396 U.S. 122, 131 (1969). The Act, however, allowed such branches to be operated only in a bank's home state, and to ensure "competitive equality" between national and state banks in this regard, Congress mandated that any national bank branch must comply with

the same state law restrictions on the location of branches applicable to state banks. *See* 385 U.S. at 257-58; 12 U.S.C. § 36(c) (1982).

In adopting these restrictions, Congress emphasized that every site at which a national bank conducted business did not necessarily constitute a branch. In a separate subsection of the Act (Section 36(f)), "branch" was specifically defined "to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which *deposits are received, or checks paid, or money lent.*" 12 U.S.C. § 36 (f) (1982) (emphasis added). If a particular national bank facility does not fall within this definition, it is not subject to state law restrictions on the location of branches. *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 924 (D.C. Cir.) (holding that if a remote national bank office does not constitute a branch, it may be located "anywhere (even across state lines)"), *cert. denied*, 429 U.S. 862 (1976).[8] The issue presented here is whether the Comptroller lawfully construed the McFadden Act in concluding that Security Pacific's discount brokerage offices are not branches and are therefore not subject to the Act's restrictions.

I. THE COMPTROLLER'S RULING THAT THE McFADDEN ACT'S DEFINITION OF "BRANCH" DOES NOT REACH DISCOUNT BROKERAGE OFFICES SHOULD BE UPHELD.

This case calls for "review . . . [of] an agency's construction of [a] statute which it administer[s]," and the Court therefore "is confronted with two questions." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The first is whether,

[8] *See also Plant City*, 396 U.S. at 139 (Douglas, J., dissenting) (" 'If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks.' ") (citation omitted).

through the language of the statute, "Congress has directly spoken to the precise question at issue." *Id.* If so, the Court should confine itself to ascertaining whether the agency has "give[n] effect to the unambiguously expressed intent of Congress." *Id.* at 843. Only if the Court determines that the statutory language does not "directly address . . . the precise question at issue" may the analysis proceed to the second question: "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.*

Security Pacific respectfully submits that the courts below erred first by failing to recognize that the Comptroller's decision gave effect to congressional intent as unambiguously expressed in the language of Section 36(f). The courts then compounded this error by improperly expanding their review beyond the narrow issue of whether the agency's interpretation was reasonable and by substituting their own erroneous statutory interpretation.[9]

A. Under The Plain Language Of The Statute, Discount Brokerage Offices Are Not Branches.

When "determining the scope of a statute, one is to look first at its language." *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (citation omitted); *see also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). And "at least in the absence of . . . a 'clearly expressed legislative intention to the contrary,' " the analysis should stop there because the "plain language [of a statute] controls its construction." *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 581 (1982) (quoting *Consumer Product Safety Commission*,

[9] Although the two-sentence court of appeals decision did not explicitly analyze the McFadden Act issue, it expressed "agreement with the result . . . generally for the reasons stated" in the district court's opinion. *See* 758 F.2d at 740 (2a). Accordingly, the courts and decisions below hereinafter are referenced collectively.

447 U.S. at 108). *See also Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986) (quoting *Chevron*, 467 U.S. at 842-43) ("If the statute is clear and unambiguous 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'").

Section 36(f) defines "branch"

> to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f) (1982). Under what the courts below concluded was the "literal reading of the statute," 577 F. Supp. at 259 (18a), the Comptroller found this definition to encompass only national bank facilities which receive deposits, pay checks, or make loans and therefore to exclude offices which engage exclusively in discount brokerage. *See supra* at 5-6. The lower courts, however, construed Section 36(f) more broadly and found discount brokerage offices to be within its scope. Based solely on a post-enactment and therefore non-probative fragment of the legislative record, the courts below held that the definition should be read as covering not only national bank offices "'receiving deposits, paying checks, or lending money,'" but also any facility "'*transacting any business carried on at the* [*bank's*] *main office.*'"[10] 577

[10] This phrase, which the lower courts interpolated into Section 36(f), was derived from a brief remark that Rep. McFadden inserted in the record ten days after the McFadden Act was passed and after Congress had adjourned. At that time, he stated that the term "branch" includes "'[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office.*'" 577 F. Supp. at 259 (18a) (quoting 68 Cong. Rec. 5816 (1927)) (emphasis added). But as this Court recently observed regarding another banking statute,

F. Supp. at 259 (18a) (emphasis in original) (citations omitted). But this augmentation of the statutory language is impermissible; courts are not "license[d] . . . to rewrite language enacted by the legislature." *United States v. Albertini*, 105 S. Ct. 2897, 2902 (1985); *see also Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984).[11]

statements outside the legislative debate, even if part of the formal congressional record, are "not 'legislative history' in any meaningful sense of the term" and thus are entitled to no weight. *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 688 (1986). *See also Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) (post-enactment statements of legislators deserve no "probative weight"); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978) ("*post hoc* observations by a single member of Congress carry little if any weight"). The McFadden Act embodies a conscious compromise between those in Congress who would have prohibited national bank branching altogether and those who would have allowed it freely, *see infra* at 36, and reliance on a single post-enactment remark "at the expense of the terms of the statute itself [would take] no account of the processes of compromise and, in the end, prevent . . . the effectuation of congressional intent." *Dimension Financial Corp.*, 106 S. Ct. at 689. Further, this particular statement is an especially unreliable indicator of legislative intent given Rep. McFadden's prior unsuccessful opposition to all branching by both federal and state banks. *See, e.g.*, 67 Cong. Rec. 2829, 2832 (1926). In any event, this lone post-enactment statement hardly constitutes a "clearly expressed legislative intention" to negate the statute's plain language. *Bread Political Action Comm.*, 455 U.S. at 581 (citation omitted). It serves primarily to demonstrate how easily Congress could have adopted a broader branch definition had it so wished.

[11] Contrary to SIA's assertion, the use of the term "include" in Section 36(f) does not suggest a "calculated indefiniteness" with respect to the question of which functions suffice to make a national bank office a branch. *See* SIA Br. in Opp. at 3 (quoting *Plant City*, 396 U.S. at 135). In that respect, Congress was explicit and precise —a facility is a branch if it receives deposits, pays checks, or makes loans. Any "calculated indefiniteness" extends only to the question of which places may be deemed to constitute branches provided that the requisite functions are performed there. In that regard, Congress was indeed open-ended, "includ[ing] any branch bank, branch office, branch agency, additional office, or any branch place of busi-

The lower courts' rejection of the Comptroller's view that Section 36(f) does not embrace those facilities involved exclusively in discount brokerage is erroneous for the further reason that in Section 2(b) of the Act, Congress simultaneously amended prior law to grant national banks explicit authority to engage in securities brokerage activities. *See* ch. 191, § 2(b), 44 Stat. 1224, 1227 (1927).[12] S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); 67 Cong. Rec. 2828 (1926) (statement of Rep. McFadden). Had Congress wished to limit the location of brokerage activities, it could easily have included them among the restricted functions it carefully delineated in the Act's branch definition. That Congress specifically legislated on the subject of national bank securities activities elsewhere in the McFadden Act creates a presumption that the omission of specific reference to such activities in Section 36(f) was intentional. *See, e.g., Russello*

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ness." But any "indefiniteness" ends there because the term "include" does not govern the latter two clauses in the definition. *See Continental Illinois Nat'l Bank & Trust Co. v. Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976), slip op. at 17-18 (emphasis added) (reprinted in Gov't C.A. Br. Addendum C) ("The term 'include' . . . does not relate to the activities involved but refers to the *places* at which the specified activities of receiving deposits, paying checks and lending money are carried out."). Indeed, applying "include" to the phrase "located in any State or Territory of the United States or the District of Columbia" would make no sense because as it stands, the clause could "include" no more than what it already states. National bank branching in other jurisdictions—"foreign countries, or dependencies, or insular possessions of the United States"—is separately addressed by Section 36(g). *See* ch. 191, § 7(g), 44 Stat. 1229 (codified at 12 U.S.C. § 36(g) (1982)). *A fortiori*, the "functions" portion of the definition (*i.e.*, "deposits received, or checks paid, or money lent"), two clauses removed from the term "include," also is outside that term's scope.

[12] This provision (codified as amended at 12 U.S.C. § 24 (Seventh) (Supp. II 1984)) authorized national banks to engage in the "business of buying and selling investment securities." The legislative history of this provision and its importance in interpreting Section 36(f) is further discussed *infra* at 24-25.

v. United States, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("'[If] Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"); *Bread Political Action Committee*, 455 U.S. at 583; *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 515 (1963).

In summary, under the plain language of Section 36(f), a facility may be deemed a branch under the McFadden Act only if it engages in at least one of the three functions enumerated in that section. *See* 577 F. Supp. at 259 (18a). Since the lower courts identified no "clearly expressed legislative intention to the contrary," they erred by not abiding by the statutory terms. *Consumer Product Safety Commission*, 447 U.S. at 108. Given the plain language of the statute and the Comptroller's uncontested finding that Security Pacific's discount brokerage offices perform none of the functions enumerated in Section 36(f) (30a-33a), the Comptroller's conclusion that these offices are not branches should have been upheld.

B. All Relevant Criteria Indicate That The Comptroller's Interpretation Was Reasonable.

The plain language of Section 36(f) should be "the end of [this] matter." *Chevron*, 467 U.S. at 842; *see supra* at 15-16. But even if there were an ambiguity in the branch definition, the Comptroller's construction should not be disturbed so long as it "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'"[13] *Id.* at 845

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[13] In other words, the issue is not whether the "construction was the only one [the agency] permissibly could have adopted" or whether the interpretation is the one "the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 483 n.11 (citations omitted). *See also United*

(quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).[14] All the indicia which should guide this narrow review—statutory language, legislative history, prior judicial interpretation, and prior administrative actions—demonstrate that the Comptroller's interpretation of Section 36(f) was eminently reasonable.[15]

1. *Statutory Language And Legislative History.*

As discussed in the previous section, the language of Section 36(f) fully supports the Comptroller's decision that the McFadden Act's branch definition encompasses only facilities engaged in at least one of the three enumerated functions and that discount brokerage offices therefore are not branches. *See supra* at 15-19. That conclusion is also strongly supported by the Act's legislative history.

Under the National Bank Act of 1864, ch. 106, § 8, 13 Stat. 100, 101-02, the "usual business" of a national bank was restricted to its main office. *See* Rev. Stat. 5190; *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924). For years, similar restrictions had existed on state-chartered banking institutions, but

States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 461 (1985); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102, 1108 (1985).

[14] As the courts below conceded, special deference should be accorded to the Comptroller's rulings because "[t]he regulatory structure of the banking laws must be permitted to adapt to the changing financial needs of our economy" and because Congress has delegated to the Comptroller, "rather than to [the courts], the complex task of applying [the law's] . . . proscriptions to the current business reality." 577 F. Supp. at 254 (7a) (citation omitted). *See also Board of Governors v. Agnew*, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring) (noting that banking regulators' "judgment . . . upon any matter which . . . is open to reasonable difference of opinion . . . should be conclusive"); *Schwab*, 468 U.S. at 217.

[15] *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985); *Chevron*, 467 U.S. at 859-66.

in the early 1920's, many states began allowing their banks to branch. As a result, concerns arose that national banks would be unable to compete in providing banking services. 67 Cong. Rec. 2832 (1926) (statement of Rep. McFadden); *id.* at 2839 (statement of Rep. Hooper). Because of the expanded branching opportunities provided under state laws, 253 national banks left the national system between 1923 and 1926 to operate under state charters. *Annual Report of the Comptroller of the Currency* 2 (1926) (hereinafter "*Annual Report*"). Congress feared that this exodus might continue with disastrous results. *See, e.g.*, 67 Cong. Rec. 2832 (1926) (remarks of Rep. McFadden); *id.* at 2856 (statement of Rep. Black); 66 Cong. Rec. 4432 (1925) (statement of Sen. Pepper).[16] Thus, to prevent the "eventual destruction of the national banking system," Congress passed the McFadden Act to authorize national banks to establish branches. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966) (citation omitted). Congress thereby "intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Walker Bank*, 385 U.S. at 261; 68 Cong. Rec. 5815 (1927) (statement of Rep. McFadden).

Nothing in the three-year legislative history of the McFadden Act reflects an intent to limit the ability of national banks to perform non-banking activities (*e.g.*, brokerage) at locations away from their main offices. *See supra* at 13-14. In enacting the branching restrictions of Section 36, Congress' sole purpose was to preserve the competitive balance as to the provision of banking services *per se* (*i.e.*, supplying money and credit and receiving deposits). *See, e.g.*, 67 Cong. Rec. 2832 (1926) (statement of Rep. McFadden) ("statewide branch bank-

[16] *See also Annual Report* at 2 ("[The] widespread desertions from the national system are clearly indicative of the difficulty which national banks find in operating under their present charter powers.").

ing will eventually lead to monopolistic control over the credit facilities of an entire state"); *id.* at 2844 (statement of Rep. Nelson) ("Branch banking inevitably tends toward concentration of money and credit in the hands of the few"). As stated by Rep. Celler, branches were perceived as additional offices "where [banks] receive deposits, pay out deposits and lend money, discount, and do an actual banking business." *Id.* at 2860. *See also id.* at 2855 (statement of Rep. Kurtz) ("[u]sually . . . branches only exist for the purpose of receiving deposits"); 66 Cong. Rec. 4433 (1925) (statement of Sen. Shipstead) (offices "where checks are cashed and deposits are accepted for practical purposes are branches"); *id.* at 1627 (1925) (statement of Rep. Stevenson) (urging Congress to regulate "agencies for receiving deposits and paying checks"). Thus, reflecting the articulated concerns of Congress, the McFadden Act branch definition speaks solely in the terms of banking functions (*i.e.*, deposits, checks, and loans).

The Act's legislative history is not only devoid of any indication that Congress intended to limit the locations at which national banks could engage in non-banking activities, but it contains clear evidence of a specific congressional intent to approve national bank operation of interstate brokerage offices. As the lower courts recognized, one of the well-established non-banking functions performed by national banks prior to the McFadden Act's passage was securities brokerage. *See* 577 F. Supp. at 255 (10a); *see also* H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926) (noting that "it [was] a matter of common knowledge that national banks [had] been engaged in the investment-securities business . . . for a number of year").[17] Indeed, "[t]he practice of providing investment services through commercial banks became so popular during the twenties that customers came to expect their commercial bankers to recommend and purchase securities for them." W. Peach, *The Security Affiliates of National Banks* 74 (1941).[18] National banks typically conducted such activities through "security affiliates" (*e.g.*, wholly-owned subsidiaries of the parent banks),[19] and although the National Bank Act of 1864 restricted a national bank's "usual" business to its main office, Rev. Stat. 5190, *see supra* at 20, those restrictions were deemed inapplicable to security affiliates.[20] Thus, in the pre-McFadden Act period, national banks commonly estab-

[17] For example, in a 1930 opinion, then-Judge Cardozo noted that the "practice" of national bank involvement in the securities business had been sufficiently common for so long that "it may be the subject of judicial notice." *Block v. The Pennsylvania Exch. Bank*, 253 N.Y. 227, 232-33 (1930) (citing *Central Nat'l Bank v. White*, 139 N.Y. 631 (1893)).

[18] By 1922, there were 62 national banks directly engaged in securities-related activities and 10 others had formed security affiliates for that purpose. W. Peach, *supra*, at 83. *See also* Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 492 (1971); V. Carosso, *Investment Banking in America* 271-72, 273-75 (1970).

[19] *Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1055-56 (1931).

[20] By its terms, Rev. Stat. 5190 did not require a national bank to conduct *all* of its business at its main office. Well before passage of the McFadden Act, the "cases clearly indicate[d] . . . a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." *Lowry Nat'l Bank*, 29 Op. Att'y Gen. 81, 87 (1911) (cited with approval in *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924)). *See also Merchants Nat'l Bank of Boston v. State Nat'l Bank of Boston*, 77 U.S. (10 Wall.) 604, 651 (1871).

Similarly, 12 U.S.C. § 81 (1982), the present-day successor to Rev. Stat. 5190, does not restrict all of a national bank's business to its main office or branches, only its "general business." Indeed, if all national bank business had been so restricted, there would have been no need for Congress to have articulated a branch definition at all in the McFadden Act, since logically, every national bank office that is not a bank's main office would have to be a branch.

lished security affiliate operations at locations away from their main offices, frequently on an interstate basis. *See* Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 494 n.26 (1971) ("[t]he securities affiliates of some of the larger banks had offices throughout the country and even in foreign countries"); W. Peach, *supra*, at 87-89; V. Carosso, *Investment Banking in America* 278 (1970).

Before 1927, national banks lacked explicit power to buy and sell securities, but they carried on this business "under their incidental charter powers." S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); *see also* W. Peach, *supra* at 39. Since this had become a regular function of state banks, both the House and Senate Banking and Currency Committees recommended in 1926 that the McFadden Act explicitly give national banks similar powers. *See* H.R. Rep. No. 83, 69th Cong., 1st Sess. 3-4 (1926); S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926).[21] Thus, in Section 2(b) of the McFadden Act, enacted simultaneously with Section 36(f), Congress "recognize[d]" and "confirm[ed]" the authority of national banks to engage in the "business of buying and selling investment securities,"[22] H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926), thereby "affirm[ing] the existence of a type of business which national banks are now conducting." S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926). And since Congress obviously was aware of the

[21] As Rep. McFadden noted, Congress was of the opinion that "modern" national banks needed the authority to "conduct . . . an investment securities business." *Hearings on the Consolidation of National Banking Associations Before a Subcomm. of the Senate Comm. on Banking and Currency*, 69th Cong., 1st Sess. 22 (1926).

[22] Congress, however, limited such activities to "buying and selling [such securities] without recourse," and regulated the amount of such securities any bank could hold to 25% of its capital stock and surplus. Ch. 191, § 2(b), 44 Stat. 1227.

interstate nature of those national bank activities,[23] this legislative history evinces unambiguous congressional intent to "affirm" (not preclude) the conduct of national bank brokerage activities through interstate offices.[24] *Id.*

Consistent with this view, the McFadden Act's passage had no restrictive effect on the interstate nature of national bank securities activities. After 1927, the number of national banks engaging in securities activity increased significantly, *see* W. Peach, *supra*, at 83, and many were opening securities offices nationwide.[25] Further, four years after enacting Section 36(f), the Senate banking committee observed that national bank "security affiliates may be organized in any State, and several of them operated by New York banks are organized in Delaware." *See Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm.*

[23] *See, e.g.*, 67 Cong. Rec. 8351 (1926) (statement of Sen. Pepper) (noting that national banks were carrying on securities business "to a very large extent throughout the country").

[24] Further, given the considerable extent to which Congress addressed national bank securities offices in the McFadden Act, it cannot credibly be argued that Congress intended to include such offices within the scope of the Act's branch definition and that the omission of securities offices from Section 36(f) was merely an oversight. *See supra* at 18-19.

[25] For example, in July 1927, only five months after passage of the McFadden Act, the security affiliate of the Chase National Bank began considering the "retail distribution of securities." W. Peach, *supra*, at 96. In October of that year, Chase announced plans to establish a complete system of securities offices "throughout this country and Canada." *Id.* (citing Commercial and Financial Chronicle, Oct. 15, 1927, at 2063). Then, in December 1927, a "retail department" was actually established by Chase, which proceeded to open offices in Chicago, Cleveland and Boston the following year. *Id.* at 96-97. By 1931, Chase had offices in fifty-three cities in twenty-six states. *Id.* at 97. *See also id.* at 97-98 (outlining the extensive establishment of interstate securities offices by other national banks in the years immediately following passage of the McFadden Act).

of the Senate Comm. on Banking and Currency, 71st Cong., 3d Sess. 1057 (1931) (hereinafter "*1931 Senate Hearings*").[26] In sum, neither before nor after enactment of the McFadden Act did Congress, federal banking regulators, or national banks perceive the Act's branching restrictions to apply to national bank securities activities, thus corroborating the Comptroller's more recent interpretation to the same effect. *See Schwab*, 468 U.S. at 218.

Additional support for the Comptroller's construction of Section 36(f) is provided by subsequent congressional action in the area. Six years after the McFadden Act became law, Congress moved to restrict the securities activities of national banks. In 1933, it enacted the Glass-Steagall Act, the relevant portion of which outlawed national bank involvement in underwriting activities (*i.e.*, investing in securities for a bank's own account). *See* ch. 89, § 20, 48 Stat. 162, 188 (1933) (codified at 12 U.S.C. § 377 (1982)). But as this Court recently found, that legislation in no way restricted a national bank's ability to broker securities for other entities and persons. *See Schwab*, 104 S. Ct. at 3009-12.[27] In adopting this regulation of national bank securities activities, Congress was fully aware that the McFadden Act had not been interpreted by banking regulators or national banks to inhibit the conduct of securities-related activities through interstate offices. *See, e.g., 1931 Senate Hearings, supra*, at 1055-57 (noting that such activities were permitted and were occurring on an interstate basis). Yet, in

[26] *See also* Osterweis, *Security Affiliates and Security Operations of Commercial Banks*, Harv. Bus. Rev., Oct. 1932, at 124, 127 (noting in the post-McFadden Act period the "possibility of nationwide [retail] distribution" of securities as a means of national bank publicity).

[27] *See also SIA v. Comptroller*, 577 F. Supp. 252, 254-57 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 790 (1986).

adopting this new legislation in the area (which also included amendments to the McFadden Act's branching restrictions),[28] Congress did not expand the Section 36(f) branch definition to include brokerage activities nor did it otherwise seek to limit the location of national bank brokerage offices. Congress therefore can be understood to have ratified the very interpretation of Section 36(f) the Comptroller rendered in this case: brokerage offices are not subject to the McFadden Act's branching restrictions. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (once a regulator's "statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned"). *Accord Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983); *Haig v. Agee*, 453 U.S. 280, 300-01 (1981).[29]

[28] The Glass-Steagall Act specifically amended the McFadden Act to enhance (not curtail) national bank authority to branch. As originally enacted, the McFadden Act limited national bank branches to large towns and cities in those states which permitted branch banking for state banks. Ch. 191, § 7(c), 44 Stat. 1224, 1228 (1927). With the bank failures of the Depression, the Glass-Steagall Act amended those provisions to permit national banks to establish branches outside these urban areas to the extent allowed by the state laws applicable to state-chartered banks. *See* ch. 89, § 23, 48 Stat. 162, 189 (1933).

[29] Congressional awareness that the Comptroller does not interpret the McFadden Act to restrict the location of non-banking activities (*e.g.*, discount brokerage) has continued into more recent times, evoking neither expressions of congressional protest nor legislative efforts to restrict these activities. For example, during legislative deliberations concerning the International Banking Act of 1978, concern was expressed about foreign banks using widely-dispersed offices to create a "growing multistate presence." S. Rep. No. 1073, 95th Cong., 2d Sess. 7 (1978). Some legislators worried that this interstate capability of foreign banks would cause

2. *Judicial Precedents.*

Prior to the decisions below, federal courts of appeals assessing whether a national bank facility is a McFadden Act branch have proceeded from the Comptroller's interpretation that only facilities performing one of the functions enumerated in the Act's definition (*i.e.*, receiving deposits, paying checks, or lending money) may be deemed to be a branch. In fact, at least one of these courts has specifically rejected arguments that Section 36(f) encompasses anything more. *See Jackson v. First National Bank of Gainesville*, 430 F.2d 1200, 1201 (5th Cir. 1970) (observing that facilities engaged in activities "such as real estate, stock investments, life insurance, etc." are not branches, noting that "none of those activities constitute 'branch banking' as now defined, but rather relate to non-banking functions"), *cert. denied*, 401 U.S. 947 (1971).

Because of the difficulty sometimes encountered in determining whether a particular facility is engaging in any of the three functions enumerated in Section 36(f), however, the courts have developed and generally apply a "basic function" test. Under this test, a national bank facility is a branch only if (1) it provides one or more banking services of the nature enumerated in the Act's branch definition and (2) its operation would upset the federal-state bank competitive balance as to such banking functions. For example, in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), this Court concluded that two remote national bank facilities (a teller window-equipped armored car and a drop box for deposits) constituted branches under the McFadden Act,

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competitive injury to national banks. Legislators favoring broad branching powers for foreign banks, however, cited the numerous non-branch facilities operated by national banks on an interstate basis as evidence that authorizing widespread branching by foreign banks would not cause such injury. *See* 124 Cong. Rec. 9095 (1978); 122 Cong. Rec. 24,403 (1976).

but only after an exhaustive examination of whether those facilities provided "basic bank services" that might give a national bank "an advantage in its competition" with state banks. *Id.* at 136-37. More recently, in *Independent Bankers Association of New York State, Inc. v. Marine Midland Bank*, 757 F.2d 453, 459-61 (2d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023), the Second Circuit sought to identify banking functions and assessed competitive impact in concluding that the branch definition did not reach an automatic teller machine located in a grocery store and used but not owned by a national bank. *See also Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (making a detailed inquiry to determine whether national bank customer-bank communications terminals ("CBCTs") performed "traditional banking transaction[s]" that would disrupt the "competitive equality" of federal and state banks); *Jackson*, 430 F.2d at 1201.[30]

The Comptroller's conclusion that discount brokerage offices are not McFadden Act branches is wholly consistent with these precedents.[31] The activities of such offices

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[30] Before deciding this case, the D.C. Circuit also subscribed to the "basic function" test. *See Independent Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 & n.** (D.C. Cir. 1980) (disagreeing with district court conclusion that national bank loan production office not performing banking functions was a branch); *Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 938-40, 941 n.73, 943 (D.C. Cir.) (concluding that a national bank's remote CBCTs were branches only after detailed evaluation of whether they performed "routine and traditional" banking functions that "closely resemble[d], in competitive effect" the functions referenced in the Act's branch definition), *cert. denied*, 429 U.S. 862 (1976).

[31] The only arguably inconsistent court of appeals opinion is *St. Louis County Nat'l Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), in which the court found a suburban trust office to be a branch even though it

(*i.e.*, serving as agent in the purchase and sale of stocks, bonds, and options) are fundamentally different from the banking functions enumerated in Section 36(f) and could not possibly "closely resemble [them] in competitive effect." *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 941 n.73 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). As this Court held in *Schwab*, although discount brokerage is "closely related to banking," it is at base a "*nonbanking* activity." *Schwab*, 468 U.S. at 210-11 (emphasis added).[32]

3. *Prior Administrative Decisions.*

The precept that McFadden Act branching restrictions reach only those facilities engaged in Section 36(f)'s three enumerated functions has been long embraced by the Comptroller. Over the past twenty years, the Comptroller has permitted national banks to provide many non-banking services (*e.g.*, consulting services to other banks, business records maintenance for customers, check

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was not performing any of the functions enumerated in Section 36(f). As discussed below, the case was wrongly decided. *See infra* at 33 n.36. Nevertheless, the Comptroller's decision took that case into account, concluding that Security Pacific's discount brokerage offices would "not constitute branching functions either as enumerated in Section 36(f) or even under the expansive *St. Louis County* approach." (34a.)

[32] The structure of 12 U.S.C. § 24 (Seventh) (Supp. II 1984), the statute which authorizes national bank activities, also indicates that brokerage is a function distinct from banking. There, Congress defined the "business of banking" to include "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; . . . receiving deposits; . . . buying and selling exchange, coin, and bullion; loaning money on personal security; and . . . obtaining, issuing and circulating notes." Brokerage is noticeably absent from this list of "banking" activities. Indeed, the authorization for national bank involvement in brokerage is contained in a different sentence of the statute, referring to a distinct "business of dealing in securities and stock." *Id.*

verification services for merchants, installation and operation of electronic credit card verification terminals in stores, audit services for other banks, computer software development for banks and other customers, data processing services, and financial and investment consulting).[33] These services for some time have commonly been provided at non-branch bank facilities, often located outside a national bank's home state.[34] For example, pursuant to specific authorization by the Comptroller, *see* 12 C.F.R. § 7.7380 (1985), national banks now maintain hundreds of interstate loan production offices, *see* Department of the Treasury, *Geographic Restrictions on Commercial Banking in the United States: The Report of the President* 186 n.4 (1981), and operate numerous U.S. government and municipal securities dealer offices on an interstate basis. *See Comptroller Release*, [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284, at 86,261 (Aug. 26, 1982).

The widespread provision of non-banking services at remote locations, which is now a firmly-entrenched, integral element of the national banking regime, stands as evidence that the Comptroller has long construed the McFadden Act's branching restrictions to be inapplicable to national bank facilities engaged exclusively in non-banking activities. Since the Comptroller's ruling here is merely a further manifestation of this "longstanding and consistent administrative interpretation" of Section 36(f), it not only meets the requirement of being con-

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[33] *See Comptroller of the Currency, Policies and Procedures Manual* 4330-11 (rev. 1982). *See also* Glidden, *The Regulation of National Banks' Subsidiaries*, 40 Bus. Law. 1299, 1302-03 (1985).

[34] *See, e.g., Foreign Bank Act of 1975: Hearings on S. 958 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 154-56, 433, 509-10 (1976); *International Banking Act of 1977: Hearings on H.R. 7325 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 301, 473-74, 556, 576 (1977).

sistent with prior rulings, but it is "entitled to considerable weight," even beyond that normally afforded administrative interpretations. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

C. The Interpretation Substituted By The Lower Courts Is Untenable.

As the court of appeals dissenters observed, the Comptroller's conclusion that national bank-operated discount brokerage offices are not branches "cannot by any means be considered unreasonable." 765 F.2d at 1198 (42a). The same cannot be said of the statutory construction the courts below would substitute.

As discussed above, the lower courts' interpretation is at odds with the plain language of Section 36(f). Moreover, it is wholly inconsistent with the historical interpretation of the section rendered by Congress, the courts, and the Comptroller. *See supra* at 20-31. But beyond these fundamental flaws, the lower courts' interpretation is patently illogical. In concluding that Security Pacific's discount brokerage offices are branches, the courts employed a test under which a facility operated by a national bank would be deemed a McFadden Act branch if any of its activities, regardless of their nature, physically "may [be] conduct[ed] at [the bank's] main office." 577 F. Supp. at 260 (20a). But this "main office" test renders the branch definition meaningless. Any function that might be performed in a remote national bank facility, by definition, "may [be] conduct[ed]" at the main office. The test thus transforms each and every national bank facility, regardless of function, into a branch.[35]

[35] As one court observed in rejecting the "main office" test, it "could not be seriously contended" that a bank establishes a branch wherever it sets up an office to perform a service, however trivial (*e.g.*, selling railway tokens, food stamps, license plates, Olympic coins, Bicentennial medallions), that also could be performed at the main office. *See Continental Illinois Nat'l Bank & Trust Co. v. Lignoul*, No. 76-C-2209, slip op. at 17 (N.D. Ill. Nov. 9, 1976).

The courts below found justification for the "main office" test primarily in dicta from *Plant City*, which they read to suggest a "calculated indefiniteness" with respect to the outer limits of the functions enumerated in the Act's branch definition. *See* 577 F. Supp. at 259 (19a) (citing 396 U.S. at 135) (emphasis in original).[36] But implicit in the suggestion the lower courts perceived in *Plant City* is a notion that there are some limits to the Act's branch definition. Because the "main office" test admits of no such limits, the test is actually in direct conflict with the purported inferences the courts drew from *Plant City*.[37] *See supra* at 17-18 n.11.

[36] The courts below also relied on a fragment of the legislative record that should have been given no weight. *See supra* at 16-17 n.10. Further, they noted the decision of a divided Eighth Circuit panel which first articulated the "main office" test. *See St. Louis County Nat'l Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976) (finding national bank's suburban office performing only trust services, a function not enumerated in Section 36(f), to be a branch because such services also were performed in the bank's main office), *cert. denied*, 433 U.S. 909 (1977) (cited at 577 F. Supp. at 260) (19a-20a). But as noted by the D.C. Circuit dissenters, that analysis had heretofore been "followed nowhere else." 765 F.2d at 1197 (41a). The forceful dissent to the Eighth Circuit opinion observed that national bank involvement in trust services was "well known to Congress," and "if Congress had intended to include in its definition of a 'branch' a trust office . . ., it would have said so just as it specifically mentioned the accepting of deposits, the cashing of checks, and the lending of money." 548 F.2d at 721 (Henley, J., dissenting).

[37] The district court also noted without explanation that brokerage services are "aimed at attracting and servicing customers conveniently." 577 F. Supp. at 260 (20a). But even had a "customer convenience" test been adopted by the district court, such a test is no more successful than the "main office" test in giving meaning to the Act's branch definition, since all national bank services are in some way "aimed at attracting and servicing customers conveniently." Moreover, to the extent that a "customer convenience" test is calculated generally to inhibit national bank competitiveness against non-bank entities (like the members of the SIA), it would be inconsistent with the McFadden Act's limited purpose of regulating only certain elements of competition between national banks and state banks. *See supra* at 21-22.

The consequences of applying the "main office" test in this case are indefensible. Because of the relatively low commissions charged by discount brokers, they require a high volume of business, a result difficult to achieve when the broker is permitted to operate only in its home state and only at its main office and authorized branches. The ruling of the courts below therefore may seriously inhibit meaningful national bank participation in discount brokerage.[38] Thus, ironically, the courts below (at SIA's behest) have used the McFadden Act, a statute intended to promote competition, to deprive the public of the full benefit of competition in the discount brokerage market.

II. THE COURTS BELOW FAILED TO APPLY THE ZONE-OF-INTERESTS STANDING REQUIREMENT, THEREBY ALLOWING SIA TO OBTAIN COMPETITIVE ADVANTAGES CONGRESS NEVER INTENDED.

As recently reaffirmed, only a party which can demonstrate standing may seek federal court resolution of "cases" and "controversies" under Article III of the Constitution. *See Bender v. Williamsport Area School District*, 106 S. Ct. 1326, 1331, 1334 n.8 (1986); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). A plaintiff must show, *inter alia*, that it has suffered "injury in fact," *Allen v. Wright*, 104 S. Ct. 3315, 3326 (1984); *Valley Forge*, 454 U.S. at 473, and that its complaint falls "within the zone of interests protected by the law invoked." *Allen v. Wright*, 104 S. Ct. at 3325. *See also Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

A mere showing of injury does not establish that a party is within the zone of interests of the law invoked.

[38] The rulings also have the anomalous effect of allowing bank holding companies to continue operating their discount brokerage subsidiaries on a nationwide basis, *see supra* at 4-5 n.4, while national banks are denied full entry to the market.

See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39 n.19 (1976); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *Data Processing*, 397 U.S. at 152-56.[39] Nevertheless, in this case, SIA was found to be within the zone of interests of the McFadden Act merely because the lower courts believed that the Comptroller's alleged failure to enforce the Act's branching provisions "would harm SIA's members." 577 F. Supp. at 259 (17a).[40] As Judge Scalia aptly stated in dissent, the courts below impermissibly "conflate[d]" the "injury-in-fact" and "zone-of-interests" requirements, never making the requisite distinct inquiry into whether SIA's claims were within the zone of interests to be protected by the McFadden Act. 758 F.2d at 740 (3a).[41]

[39] The zone-of-interests requirement serves the important purpose of protecting the legislature's prerogative to determine the interests protected by a statute. *See Data Processing*, 397 U.S. at 154; *Leaf Tobacco Exporters Ass'n v. Block*, 749 F.2d 1106, 1115 (4th Cir. 1984). "A test requiring only injury in fact . . . would necessarily obstruct and undermine legislative control and guidance over essentially political issues by conferring standing to litigate on a host of parties whose interests Congress failed to protect." *Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621, 624 (4th Cir. 1986).

[40] The district court justified its conclusions concerning the zone-of-interests requirement solely by reference to its injury-in-fact analysis:

> To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would *harm* SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

577 F. Supp. at 258-59 (17a) (emphasis added).

[41] Prior to this case, the D.C. Circuit had been far more meticulous in evaluating whether plaintiffs had actually met the zone-of-interests standing prerequisite. *See, e.g., Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1088 (D.C. Cir.), *cert. denied*, 105 S. Ct.

Had the courts below conducted a proper standing inquiry, they would have found that the McFadden Act and its legislative history provide absolutely no indicia that the Act was intended to benefit the interests of non-bank competitors of national banks. To the contrary, Congress adopted the McFadden Act for the sole purpose of giving two groups—national banks and state banks—a mechanism by which they could preserve their "competitive equality" with respect to branch banking. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *see also supra* at 21. As such, the Act represents a "carefully balanced legislative compromise concerning two primarily interested groups."[42] *R. T. Vanderbilt Co. v. Occupational Safety & Health Review Commission*, 708 F.2d 570, 577 (11th Cir. 1983). The courts below upset the balance struck by Congress by allowing interlopers (*i.e.*, non-banks) to exploit the legislation to insulate themselves from competition by national banks. *See, e.g., Leaf Tobacco Exporters*, 749 F.2d at 1115 ("[W]here Congress has . . . clearly defined the class to be protected, the zone test . . . prevent[s] groups outside of the class from usurping the legislative entitlement"); *Bank Stationers Association v. Board of Governors*, 704 F.2d 1233, 1236-37 (11th Cir. 1983).

Even if the decisions below suggest that the courts made some attempt at a zone-of-interests analysis, it was badly misguided and wholly inadequate.[43] From the out-

509 (1984); *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 952 (D.C. Cir. 1982).

[42] *See* 66 Cong. Rec. 4527 (1925) (statement of Sen. Pepper) (noting that the McFadden Act was intended "to give to national banks . . . such a measure of relaxation and privilege . . . as will go a little in the direction of helping the national banks, but not far enough . . . to arouse any of the reasonable apprehensions of those who are opposed to branch banking altogether").

[43] Stating that there "need [not] be any explicit expression in the statute or its legislative history for the court to find that SIA

set, their inquiry was doomed by a mistaken belief that the McFadden Act was intended "to curb the scope of national banks' activities" in general.[44] 577 F. Supp. at 258 (17a). Congress has enacted some statutes to preclude national bank competition with non-bank entities in fields unrelated to banking.[45] *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 157 (1970) (interpreting the Bank Service Corporation Act, 12 U.S.C. § 1864); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (same). But that is not the congressional intent of all banking statutes.

As discussed above, the McFadden Act was intended to enhance (not diminish) the competitiveness of national banks and certainly was not enacted to protect non-bank interests. *See supra* at 21. It is therefore

is within the zone of interests protected by the McFadden Act," the courts below simply declined to examine these potential indicia of legislative intent. 577 F. Supp. at 258 (16a). The courts below thus failed to make a critical and, in this case, dispositive inquiry on the zone of interests question. *See Barlow v. Collins*, 397 U.S. 159, 164-65 & 165 n.7 (1970) (the statutory language and legislative history of 7 U.S.C. § 1444(d) revealed Congress' intent to protect tenant farmers' interests); *Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621, 625-26 (4th Cir. 1986); *R.T. Vanderbilt Co.*, 708 F.2d at 576; *Control Data Corp. v. Baldrige*, 655 F.2d 283, 294 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981).

[44] The district court derived this erroneous perception by "read[ing]" the McFadden Act's provisions "in conjunction with the original restrictions of the National Bank Act." 577 F. Supp. at 258 (17a). Rather than perpetuate the National Bank Act's branching restrictions, however, the McFadden Act was actually intended to *reduce* previous locational restrictions on national banks. *See supra* at 20-21. Thus, Congress' purpose in enacting the McFadden Act in no way coincided with any intent it may have had in 1864 "to curb the scope of national banks' activities." 577 F. Supp. at 258 (17a).

[45] That SIA may have had standing in this case to raise claims under the Glass-Steagall Act, parts of which contain general prohibitions against non-banking activity, cannot give it standing to raise claims under the McFadden Act, which embodies "different

dispositive that this lawsuit was brought by neither a national bank nor a state bank, but rather by an association of non-banks seeking to use the McFadden Act to shield their members from competition and deny the public the benefits thereof.[46]

If the decisions below stand, their expansive view could be read as giving any non-bank entity, such as a business "competing for the parking spaces that an unlawful branch may occupy," 765 F.2d at 1197 (Scalia, J., joined by Bork and Starr, JJ., dissenting), standing to mount challenges under the provisions of the McFadden Act. Congress did not intend such a result.

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goals and policies." *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

[46] Historically, only national and state banks and banking regulators have brought McFadden Act suits, and they have shown no hesitation to do so. *See, e.g., State Bank of Fargo v. Merchant Nat'l Bank & Trust Co.*, 593 F.2d 341, 345-46 (8th Cir. 1979) (seeking declaratory and injunctive relief to prohibit national bank from operating two customer electronic funds transfer centers); *State Bank of Rensselaer v. Heimann*, 619 F.2d 679, 683 (7th Cir. 1980) (challenging the opening of national bank branch facility); *First Bank & Trust Co. v. Smith*, 545 F.2d 752, 753 (1st Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (same); *Hempstead Bank v. Smith*, 540 F.2d 57 (2d Cir. 1976) (same); *Springfield State Bank v. National State Bank of Elizabeth*, 459 F.2d 712 (3d Cir. 1972) (same); *Ohio Bank & Savings Co. v. Tri-County Nat'l Bank*, 411 F.2d 801 (6th Cir. 1969) (same); *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1091 (4th Cir. 1969) (same). *See also* the cases cited *supra* at 28-29.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully submits that this Court should either (1) reverse the court of appeals insofar as it overruled the Comptroller's decision that the McFadden Act's branching provisions do not apply to discount brokerage offices or (2) vacate that aspect of the decision below in view of SIA's lack of standing with respect to its McFadden Act claims.

Respectfully submitted,

Of Counsel:
EDWARD J. MCANIFF
FREDERICK B. MCLANE
O'MELVENY & MYERS
400 S. Hope Street
Los Angeles, California 90071

RUSSELL A. FREEMAN
SECURITY PACIFIC NATIONAL BANK
333 S. Hope Street (H54)
Los Angeles, California 90071

ARTHUR A. FRITZ
SPC SECURITIES SERVICES CORP.
333 S. Hope Street (H23-80)
Los Angeles, California 90071

WILLIAM T. COLEMAN, JR.
Counsel of Record
MARK WOOD
JOHN H. BEISNER
JACOB M. LEWIS
STUART A. STREICHLER
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

Dated: May 16, 1986

(10) (11)

Nos. 85-971 and 85-972

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

SECURITY PACIFIC NATIONAL BANK, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONER

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
NICHOLAS S. ZEPPOS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT M. KIMMET
General Counsel
Department of the Treasury
Washington, D.C. 20220

RICHARD V. FITZGERALD
Chief Counsel

EUGENE M. KATZ
MARK L. LEEMON
Attorneys

Office of the Comptroller of the Currency
Washington, D.C. 20219

55A

QUESTIONS PRESENTED

1. Whether an association of securities brokers, underwriters, and investment bankers has standing to challenge the application of the McFadden Act's branching limitations, 12 U.S.C. 36(c), to national banks.

2. Whether offices of national banks that offer only discount brokerage services are "branches" within the meaning of Section 7(f) of the McFadden Act, 12 U.S.C. 36(f).

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BRIEF FOR THE FEDERAL PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 758 F.2d 739. The order and opinion of the court of appeals respecting denial of the suggestion for rehearing en banc (Pet. App. 4a-9a) is reported at 765 F.2d 1196. The opinion of the district court (Pet. App. 10a-29a) is reported at 577 F. Supp. 252.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48a-49a) was entered on April 12, 1985. A petition for rehearing was denied on July 12, 1985 (Pet.

App. 4a-9a). On October 1, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 9, 1985. On November 1, 1985 the Chief Justice further extended the time for filing the petition to and including December 9, 1985. The petition for a writ of certiorari was filed on that date and was granted on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at App., *infra*, 1a-2a.

STATEMENT

1. a. Section 7(c) of the McFadden Act (the Act) (12 U.S.C. 36(c)) authorizes any national bank to establish branch offices in the state in which it is located. It may do so, however, only to the extent that "such establishment and operation are at the time authorized to State banks by the statute law of the State in question." 12 U.S.C. 36(c)(2). See generally *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 253 (1966).[1] By its terms, this geographical limitation does not restrict the operation of all national bank offices; it applies only to the operation of national bank "branches," which are defined by Section 7(f) of the Act (12 U.S.C. 36(f)) "to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

[1] In addition, a national bank may branch within its home city "if such establishment and operation [of branches] are at the time expressly authorized to State banks by the law of the State in question." 12 U.S.C. 36(c)(1).

In 1982, two national banks, Union Planters National Bank of Memphis (Union Planters) and Security Pacific National Bank of Los Angeles (Security Pacific), applied to the Comptroller of the Currency for permission to open offices that would offer discount brokerage services to the public.[2] Security Pacific's application stated that these services initially would be offered at Security Pacific's established branch offices throughout California, and eventually would be provided at nonbranch offices in California and other states. Pet. App. 11a. Union Planters' application stated that it planned to acquire Brenner Steed & Associates, Inc. (Brenner Steed), an existing discount brokerage firm, and that it intended to offer Brenner Steed's services at selected Union Planters branches in Tennessee, as well as at locations in six other states (*id.* at 10a-11a).

On August 26, 1982, the Comptroller approved Security Pacific's application, concluding that bank offices offering only discount brokerage services are not "branches" within the meaning of the Act, and therefore are not subject to the Act's geographical restrictions on the locations where national bank offices may operate.[3] The Comptroller first noted that

[2] Discount brokers execute trades on behalf of their customers but do not offer investment advice. As a result, the commissions they charge are substantially lower than those charged by full-service brokers. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2.

[3] The Comptroller also found that Security Pacific's provision of discount brokerage services was not barred by the Glass-Steagall Act (12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378). Pet. App. 31a-39a. Respondent's challenge to this ruling was rejected by the district court (*id.* at 13a-20a) and

the term "branch" is "statutorily defined to include" any place " 'at which deposits are received, or checks paid, or money lent.' " Pet. App. 39a (quoting 12 U.S.C. 36(f)). He then determined that Security Pacific's discount brokerage offices would not receive deposits, pay checks, or make loans (Pet. App. 39a-43a), and thus would not fall within the statutory definition.

Although this conclusion sufficed to establish that the operation of discount brokerage offices away from chartered branches would not run afoul of the Act, the Comptroller also addressed the question whether those offices nevertheless "could be found by a court to be branches within the meaning of the McFadden Act" under *any* reading of the statute (Pet. App. 43a). He concluded that they could not. Even if the Act were read to provide that some bank offices that do not perform even one of the three services enumerated in Section 36(f) are branches, the Comptroller explained, such offices "should at the very least" offer services involving "dealings with the public requiring a specialized banking or similar license" (Pet. App. 43a-44a). Discount brokerage operations do not fall into this category. Indeed, the Comptroller explained that it would be inconsistent with settled practice in the banking industry to find that securities brokerage activities constitute a branch banking function, because a substantial "number of banks currently operat[e] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations

by the court of appeals (*id.* at 2a); respondent's petition for a writ of certiorari (No. 85-392) from the Glass-Steagall aspect of the court of appeals' decision was denied by this Court on January 13, 1986.

on both an intra-state and interstate basis." *Id.* at 44a.[4]

2. In response to the Comptroller's decisions, respondent, a trade association representing securities brokers, underwriters, and investment bankers (see Pet. App. 10a), brought this action in United States District Court for the District of Columbia. Among other things (see note 3, *supra*), respondent contended that bank discount brokerage offices are branches within the meaning of Section 36(f) and thus are subject to the geographical restrictions imposed by Section 36(c). Respondent therefore argued that discount brokerage services may be offered by national banks—including Security Pacific and Union Planters—only at their central offices or at licensed branches.

In relevant part, the district court ruled for respondent. The court first held that respondent had standing to challenge the Comptroller's implementation of the Act. Although the court acknowledged that the Act was passed "to equalize competi[ti]on between state and national banks" (Pet. App. 20a), it nevertheless held that respondent's claim fell "within the zone of interests protected by the McFadden Act" (*id.* at 23a).[5] Relying on *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970) and *Association of Data Processing Service Organizations* v. *Camp*,

[4] Shortly after issuing this opinion, the Comptroller approved without comment Union Planters' application to acquire Brenner Steed (Pet. App. 47a).

[5] The court also found that respondent had demonstrated that it will suffer actual harm from the Comptroller's ruling, pointing to respondent's allegation "that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them" (Pet. App. 23a).

397 U.S. 150 (1970), which held that bank competitors may challenge the implementation of the Bank Service Corporation Act (12 U.S.C. 1861-1867), the district court reasoned that there is no need for "any explicit expression in the statute or its legislative history for the court to find that [respondent] is within the [Act's] zone of interests" (Pet. App. 23a). It was enough, in the court's view, that the Act, read in conjunction with the National Bank Act of 1864, "evince[d] the intent of Congress to curb the scope of national banks' activities" (Pet. App. 24a). If national banks succeed in avoiding these curbs, the court stated, respondent's members will be injured "just as" the bank competitors in *Arnold Tours* and *Data Processing Organization* had been harmed.

On the merits, the court rejected the Comptroller's conclusion that national bank offices offering only discount brokerage services are not branches. The court did not disagree with the Comptroller's finding that such offices offer none of the three banking services enumerated in Section 36(f) (that is, the receipt of deposits, the payment of checks, or the making of loans). Instead, the court took issue with the Comptroller's primary conclusion that the Act's branching restrictions apply *only* to bank offices that perform at least one of the three activities listed in the statutory definition. The court noted that Representative McFadden, in post-enactment remarks, described the term "branch" to include a bank office that "transact[s] any business carried on at the main [bank] office" (Pet. App. 26a, quoting 68 Cong. Rec. 5816 (1927) (emphasis omitted)). And the district court read this Court's holding in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122

(1969), as requiring "a broader, more flexible interpretation * * * of the statute than that followed by the Comptroller" (Pet. App. 26a).

The district court therefore ruled that the "brokerage business * * * is within the category of 'general business' which national banks may conduct at their main office and, as such, is subject to the branching restrictions" (Pet. App. 28a). The court accordingly invalidated the Comptroller's ruling to the extent that it permitted Union Planters and Security Pacific to offer discount brokerage services at nonbranch locations.

In a brief per curiam opinion, the court of appeals affirmed the district court's ruling, "generally for the reasons stated" by the district court (Pet. App. 2a). Judge Scalia dissented from the McFadden Act aspect of this holding, arguing that the district court had "conflate[d] the constitutional requirement of injury in fact and the separate requirement that 'Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute'" (Pet. App. 3a (quoting *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984), cert. denied, No. 84-362 (Nov. 26, 1984)). In Judge Scalia's view, only "state banks and possibly federal banks" are within that zone (Pet. App. 3a). He therefore would have dismissed respondent's claims under the Act for lack of jurisdiction.

The Comptroller's petition for rehearing en banc[6] was denied (Pet. App. 4a-5a) over a dissent by Judge Scalia, joined by Judges Bork and Starr. Judge Scalia repeated his criticism of the court's holding on standing, finding it "uncontroverted that

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[6] Security Pacific intervened and filed its own petition for rehearing en banc.

[the Act's] purpose was to establish competitive equality between state and federal banks * * *. Thus, state banks (and state banking commissions) are obviously within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy" (*id.* at 6a). In these circumstances, Judge Scalia reasoned, the court's ruling "entirely reduces the 'zone of interest' inquiry under the McFadden Act to an inquiry into 'injury in fact'" (*id.* at 6a-7a).

Judge Scalia also took issue with the court's holding on the merits. He noted that discount brokerage services are not one of the activities enumerated in Section 36(f), and that the remarks of Congressman McFadden relied upon by the district court were "made after passage of the Act." Pet. App. 8a. Judge Scalia also found this Court's ruling in *Plant City*, which described the Section 36(f) definition as "'suggest[ing] a calculated indefiniteness'" (Pet. App. 8a, quoting 396 U.S. at 135 (emphasis omitted)), to be "virtually dispositive *in favor of the Comptroller*" (Pet. App. 8a (emphasis in original)), since such a definition "presents precisely the situation in which [the court's] deference to the agency should be at its height" (*ibid.*).

SUMMARY OF ARGUMENT

A. At the outset, the courts below erred in holding that respondent has standing to assert its claim under the Act. This Court repeatedly has explained that a litigant is entitled to have a claim heard on the merits only when the claim falls within the "zone of interests" protected or regulated by the statute

in question. This zone of interests requirement, like the other prudential limitations on standing, safeguards separation of powers principles by ensuring that persons who were consciously excluded from the administrative process will not be able to manipulate the statutory scheme to achieve purposes outside the contemplation of Congress. At the same time, application of the zone test serves to ensure the complete adversarial presentation of the relevant issues before the court.

Because the inquiry in a zone of interests case focuses on the relationship between the congressional purpose and the plaintiff's interests, resolution of that inquiry turns on the legislative purpose. And here, the usual indicia of congressional intent—the statutory language and legislative history—plainly show that respondent falls well outside the zone of interests protected by the Act. On its face, 12 U.S.C. 36(c) imposes limits on national banks entirely in terms of the conduct authorized to state banks by state law, which suggests that Congress did not intend to protect securities brokers or other bank competitors when it passed the Act. And this proposition is unambiguously confirmed by the legislative history, which establishes that the Act was intended to ensure "competitive equality" between state and national banks by guaranteeing "that neither [banking] system have advantages over the other in the use of branch banking." *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 131 (1969). Any benefits that respondent obtains from the Act's branching restrictions are thus entirely incidental to the purposes of the statute.

Against this background, the courts below relied on two decisions according standing to bank competitors, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970)

and *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), to hold that respondent's claim falls within the zone of interests protected by the Act. But that reliance was misplaced. In *Arnold Tours* and *Data Processing Organizations*, the Court simply concluded that Congress, in the statute at issue, "*had* provided competitor standing." *United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974) (emphasis added). Indeed, it was central to the Court's holding in those cases that the statute there involved—in contrast to the McFadden Act—had not been designed to benefit only a single group of bank competitors. Here, where Congress intended to regulate only the type of competitive injury that state and national banks might inflict upon one another, there is no reason to depart from the congressional purpose—particularly when doing so would simply afford respondent's members a windfall and unintended protection from the normal competition of the marketplace.

B. 1. The court of appeals' holding on the merits —which casts doubt on the validity of longstanding and widespread practices in the banking industry— also cannot be reconciled with the language and legislative history of the Act. Section 36(f) defines the term "branch" to "include" any bank office "at which deposits are received, or checks paid, or money lent." As the Comptroller explained in detail, discount brokerage offices perform none of these functions— and therefore cannot be deemed to be branches within the meaning of the statute. Section 36(f)'s use of the term "include" did not give the courts below license to disregard the three enumerated functions: that term relates not to the activities performed by a bank at a given office but to the *places* at which the specified activities are carried on.

Again, the legislative history confirms that the Act means what it says. Debate on the Act centered almost exclusively on the concern that national banks might obtain monopoly control over credit and the money supply if permitted to branch; because it is through the receipt of deposits, the cashing of checks, and the making of loans that credit and money are controlled, it is not surprising that congressional discussion about the appropriate scope of restrictions on branching referred only to bank offices that perform those functions. In contrast, during the three years that the Act was under consideration, no suggestion was made that its branching limitations would affect the *nonbanking* activities of national banks.

The legislative background also makes plain that the omission of brokerage operations from the functions enumerated in Section 36(f) could not have been an oversight. Congress was fully aware, at the time of the Act's adoption in 1927, that national banks had long been engaged in the buying and selling of securities on an interstate basis. Yet in the same legislative package in which it defined the term "branch" and established Section 36(c)'s branching rules, Congress specifically confirmed the authority of national banks to continue to engage in the buying and selling of investment securities. Had Congress intended to require that these activities be performed only at licensed branches in the bank's state of incorporation, it presumably would have said so.

2. In disregarding the Comptroller's construction of Section 36(f), the courts below relied on *Plant City*, which suggested that the Act's definition of "branch" contains "a calculated indefiniteness with respect to the outer limits of the term." 396 U.S. at 135. In *Plant City* itself, however, the Court held the

bank facility at issue to be a branch because it performed one of the statutorily enumerated functions (the taking of deposits); the Court specifically declined to decide whether bank offices that do not perform one of those functions ever may be branches. Moreover, as Judge Scalia noted in dissent, if the statutory definition does contain a "calculated indefiniteness," deference to the views of the agency charged with the Act's administration should be at its height. Indeed, the propriety of the Comptroller's reading of the Act is confirmed by the banking industry's longsettled and widespread practice of operating nonbanking offices on an interstate basis—a practice that has been expressly noted by Congress.

In any event, even if the three functions enumerated in Section 36(f) are not the only ones that characterize branches, the courts below erred in holding that *all* bank operations must be conducted at branch facilities. The three functions listed in the statute must have at least some bearing on the definition of the term branch; their inclusion in Section 36(f) otherwise would have been wholly superfluous. And what the three have in common is each one's status as a basic banking service. Against this background, as the Comptroller explained, even the broadest reading of Section 36(f) must limit branches to those bank offices that require a specialized banking or similar license. This distinction between basic bank services and the more peripheral activities that are performed by banks is hardly novel: in 12 U.S.C. (Supp. II) 24 Seventh, for example, Congress distinguished the "business of banking" from the "business of dealing in securities and stock." The courts below thus erred in failing to defer to the Comptroller's careful distinction between traditional bank services and discount brokerage operations.

ARGUMENT

THE COURTS BELOW ERRED IN OVERTURNING THE COMPTROLLER'S DETERMINATION THAT BANK OFFICES OFFERING ONLY DISCOUNT BROKERAGE SERVICES ARE NOT BRANCHES WITHIN THE MEANING OF THE McFADDEN ACT

Both aspects of the rulings below are flawed by a basic misunderstanding of the meaning of the McFadden Act. The purposes of that statute are unambiguous: it was written to assure competitive equality between national and state banks in the provision of basic banking services. Nonbanking entities such as respondent that wish to obtain windfall relief from the competition offered by national banks are thus wholly outside the zone of interests protected or regulated by the Act. And even apart from the question of standing, the language and legislative history of the Act—which are bolstered by the Comptroller's consistent administrative interpretation of the statute—squarely establish that the Act's branching restrictions apply only to bank offices that accept deposits, cash checks, or make loans. Offices that engage in the buying and selling of securities plainly do not fall into this category.

A. Respondent Does Not Have Standing To Challenge The Comptroller's McFadden Act Ruling Because Its Claim Does Not Fall Within The Zone Of Interests Protected Or Regulated By The Act

Before a plaintiff is accorded the right to sue in federal court, he must do more than claim "injury in fact." Even "apart from [satisfying] the 'case' or 'controversy' test" (*Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970)), the litigant must establish that his claim

"fall[s] within 'the zone of interests to be protected or regulated by the statute * * * in question.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Data Processing Organizations*, 397 U.S. at 153). This Court repeatedly has explained that satisfaction of the zone of interests requirement is a prerequisite to a finding of standing.[7] In applying the test, the Court has thus indicated that if Congress "intended to protect" a given category of litigants, those litigants "would be within the zone of interests protected by [the statute at issue] and would therefore have standing to bring an action" to enforce that statute; if the statute were "intended only to protect" a different group of persons, however, "there would be no need to provide [the first category of litigants] with any remedy at all." *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 7 n.7. And here, respondent plainly is unable to establish that it is "within the class of persons that the statutory provision was designed to protect." *Data Processing Organizations*, 397 U.S. at 155.

1. a. The zone of interest requirement, like other prudential limitations on standing, bears a "close

[7] See *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12; *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, (1971); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

relationship to the policies reflected in" Article III's case or controversy requirement. *Valley Forge*, 454 U.S. at 475. See *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1088 (D.C. Cir. 1984). It thus serves largely to safeguard separation of powers principles, by "secur[ing] the benefits of a statutory program for the groups that Congress intended to benefit." *Leaf Tobacco Exporters Ass'n* v. *Block*, 749 F.2d 1106, 1111 (4th Cir. 1984). Because "it is primarily the province of Congress to consider and weigh the interests of those potentially affected by legislation and subsequent administrative action," application of the zone test ensures that persons consciously excluded from the administrative process will not be able to manipulate the statutory scheme to achieve purposes outside the contemplation of Congress. *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621, 622-623 (4th Cir. 1986). See *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 139 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Cf. *Pierce County*, slip op. 7 n.7. As Professor Jaffe put it, if the persons that "the law chooses to protect are satisfied with the status quo through it may involve an alleged violation [of the law], why should a stranger have a right to insist on enforcement?" Jaffe, *Standing Again*, 84 Harv. L. Rev. 633, 637 (1971).[8]

[8] By pretermitting litigation on the merits, the zone of interests test "permits government officials to act in furtherance of congressional purposes without the prospect of protracted court challenges from those whose interests Congress clearly did not protect." *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1116. In contrast, "full litigation would contemplate a group of participants and a forum of decision-making that Congress did not establish in the statutory program." *Id.* at 1111.

At the same time, application of the zone of interests limitation "ensure[s] the complete adversarial presentation of the issues before the court" (*Bank Stationers Ass'n* v. *Board of Governors*, 704 F.2d 1233, 1236 (11th Cir. 1983)); it is thus related to the general rule that a plaintiff must assert his own rights, rather than those of third parties. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1111. So far as the interests that Congress sought to protect are concerned, a litigant who falls outside the zone is, in substance, nothing more than a "'concerned bystander[].'" *Valley Forge*, 454 U.S. at 473 (quoting *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 687 (1973)). Such a litigant is not ideally situated either to advance legal arguments or to develop a factual record that sheds light on the concerns that motivated Congress when it enacted the statute at issue. Consequently, in relation to the ends that Congress intended to accomplish in adopting the legislation, there is considerable danger that such a litigant's claims may not be presented in a "'context conducive to a realistic appreciation of the consequences of judicial action.'" *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 7 (quoting *Valley Forge*, 454 U.S. at 472). Cf. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974).

b. Because the inquiry in a zone of interests case focuses on the "critical relationship between congressional purpose and the plaintiffs' interests" (*Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1113),[9] that

[9] The Court has noted more generally that the question in all cases involving prudential limitations on standing "is whether

inquiry requires informed consideration of the legislative purpose. Resolving such a case accordingly requires use of the usual tools for discerning congressional intent: the statutory language and the legislative history. Not surprisingly, this Court, which has identified the relevant test as whether Congress "intended to protect" a given class of litigants (*Pierce County*, slip op. 7 n.7), has looked at those basic sources in its zone of interest cases. See *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 n.3 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 164-167 & n.7 (1970). And the courts of appeals have agreed that a plaintiff, before satisfying the zone requirement, must produce "some indicia—however slight—that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought." *Copper & Brass Fabricators Council, Inc.* v. *Department of the Treasury*, 679 F.2d 951, 952 (D.C. Cir. 1982).[10]

Thus, the courts of appeals generally have

> recognized that in applying the zone test a court must discern whether the interest asserted by a party in the particular instance is one intended by Congress to be protected or regulated by the statute under which suit is brought. * * * Most

the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500 (footnote omitted).

[10] Because standing requirements "are threshold determinants of the propriety of judicial intervention," "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518.

courts also acknowledge that the sources pertinent to this examination are the language of the relevant statutory provisions and their legislative history.

Control Data Corp. v. *Baldrige*, 655 F.2d 283, 293-294 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981) (footnotes omitted). See, *e.g.*, *Branch Bank & Trust Co.*, 786 F.2d at 624-626; *Dialysis Centers, Ltd.* v. *Schweiker*, 657 F.2d 135, 138 (7th Cir. 1981); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759, 765-766 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *AFGE* v. *Dunn*, 561 F.2d 1310, 1321-1313 (9th Cir. 1977); *Bank Stationers*, 704 F.2d at 1236; *Copper & Brass Fabricators*, 679 F.2d at 952.

The Court also has taken a similar approach in related contexts. In determining whether a statute forecloses review of administrative action, for example—an inquiry that is closely associated with the zone of interests analysis (see, *e.g.*, *Data Processing Organizations*, 397 U.S. at 156-157)—the Court has held that "the preclusion issue turns ultimately on whether Congress intended for that class [of litigant] to be relied upon to challenge agency disregard of the law." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984). And when addressing the related question whether Congress intended a statute to provide a litigant with a private cause of action, the Court has "plainly stated that [the] focus must be on 'the intent of Congress.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 377 (1982), quoting *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). See *California* v. *Sierra Club*, 451 U.S. 287, 297-298 (1981); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 770 (1981). In such cases, the Court has found the surest sign of congressional intent to be the statutory language and legislative history. See *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-536 (1984); *Sierra Club*, 451 U.S. at 297-298; *Touche Ross & Co.* v. *Reddington*, 442 U.S. 560, 575-576 (1979).

2. a. Here, the indicia of congressional intent uniformly show that respondent falls well outside the zone of interests protected by the Act. Section 36(c) (emphasis added)—the provision that respondent is attempting to enforce—on its face imposes limits on national banks that are measured entirely in terms of the conduct "authorized to *State banks*" by state law. As the Chief Justice has noted, the obvious implication of such language is that it "limit[s] branch banking of national banks specifically in order to protect state banks from the unrestricted competition of national banks." *National Ass'n of Securities Dealers* v. *SEC*, 420 F.2d 83, 106 (D.C. Cir. 1969) (Burger, J., concurring), rev'd on other grounds, 401 U.S. 617 (1971). This certainly suggests that Congress had no intention to protect or benefit securities brokers, or other competitors of national banks, when it passed the Act. Cf. *Community Nutrition Institute*, 467 U.S. at 346-347; *Barlow*, 397 U.S. at 164.

The legislative history of the Act confirms this conclusion. It establishes beyond dispute that the Act "was a response to the competitive tensions inherent in a dual banking structure where state and national banks coexist in the same area," and was designed to guarantee "that neither system have advantages over the other in the use of branch banking." *Plant City*, 396 U.S. at 131. Prior to the passage of the Act in 1927, the National Bank Act of 1864 had flatly barred national banks from establishing branches. See *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966);

First National Bank v. *Missouri*, 263 U.S. 640, 656 (1924). State banks, however, could branch as permitted by the laws of the individual states. This "intolerable" situation placed national banks at a "considerable disadvantage" (H.R. Rep. 83, 69th Cong., 1st Sess. 6-7 (1926))—so much so that many national banks were driven to surrender their national charters, or were forced out of business altogether. See *Walker Bank*, 385 U.S. at 257; S. Rep. 473, 69th Cong., 1st Sess. 7 (1926); 66 Cong. Rec. 1578, 1646 (1925) (remarks of Rep. McFadden); *id.* at 1580 (remarks of Rep. Wood); *id.* at 1631-1632 (remarks of Rep. Williams); *id.* at 1637 (remarks of Rep. Hull); *id.* at 1625, 1638 (remarks of Rep. Celler); *id.* at 4432 (remarks of Sen. Pepper).

By allowing national banks to branch, the Act was intended to "protect national banks from the unrestricted branch bank competition of state banks." *Plant City*, 396 U.S. at 131. See *Walker Bank*, 385 U.S. at 257-258. At the same time, Congress protected state banks by permitting national banks to branch only "in those cities where State banks are allowed to have [branches] under State laws." H.R. Rep. 83, *supra*, at 7.[11] The Act thus adopted what

[11] As originally adopted, the Act permitted national banks to branch only in those cities where the bank had its main office. See Act of Feb. 25, 1927, ch. 191, § 2, 44 Stat. 1226. In 1933, Congress amended the Act to permit national banks (as well as state banks that are members of the Federal Reserve System) to branch statewide, if such branching is permitted to state banks by state law. See Act of June 16, 1933, ch. 89, § 23, 48 Stat. 189; *Walker Bank*, 385 U.S. at 259-260. This amendment "further strengthened the policy of competitive equality." *Plant City*, 396 U.S. at 132. See 76 Cong. Rec. 2511 (1933) (remarks of Sen. Glass); 77 Cong. Rec. 5862 (1933) (remarks of Sen. Long); *id.* at 5896 (remarks of Rep. Luce).

this Court and Congress repeatedly have characterized as a policy of "competitive equality" between national and state banks. See *Plant City*, 396 U.S. at 131-134, 136, 138; *Walker Bank*, 385 U.S. at 258, 261. As the Court has noted, the aim of fostering competitive equality was the "clearcut purpose [of the Act] * * * forcefully expressed by both friend and foe of the legislation at the time of its adoption" (*id.* at 261). See, *e.g.*, S. Rep. 473, *supra*, at 14; H.R. Rep. 83, *supra*, at 6-7; 66 Cong. Rec. 1580 (1925) (remarks of Rep. Wood); *id.* at 1582 (remarks of Rep. McFadden); *id.* at 1627 (remarks of Rep. Stevenson); *id.* at 1628, 1638 (remarks of Rep. Celler); *id.* at 1632, 1634 (remarks of Rep. Williams); *id.* at 1637 (remarks of Rep. Hull); *id.* at 1640 (remarks of Rep. Luce); *id.* at 4432 (remarks of Sen. Pepper); *id.* at 4435 (remarks of Sen. Glass); *id.* at 4508 (remarks of Sen. Couzens); 67 Cong. Rec. 8297, 8352 (1926) (remarks of Sen. Pepper); *id.* at 8352 (remarks of Sen. McLean).

This legislative history plainly establishes that, while respondent may benefit from the restrictions imposed by the Act, those benefits "are 'wholly incidental to the purpose and design of the program.'" *Dialysis Center*, 657 F.2d at 138 (quoting *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262, 265 (10th Cir), cert. denied, 454 U.S. 832 (1981)). See generally *Control Data*, 655 F.2d at 295. Thus, as Judge Scalia explained, "the brokerage houses suing in the present case are no more within [the zone of interests protected by the Act] than are businesses competing for the parking spaces that an unlawful branch may occupy." Pet. App. 6a.[12]

[12] This example emphasizes the importance of the zone test in encouraging proper presentation of the relevant issues. Resolving a challenge under the Act may require difficult and

b. Against this background, the courts below relied on *Data Processing Organizations* and *Arnold Tours* to hold that respondent's claim falls within the zone of interests protected by the Act. But that reliance was misplaced. Those cases involved, respectively, challenges brought by data processors and by travel agents under Section 4 of the Bank Service Corporation Act, 12 U.S.C. 1864,[13] to rulings by the Comptroller permitting banks to offer data processing and travel services to their customers. In allowing the challenges to proceed, the Court in those cases held only that, in the face of congressional silence about who is to benefit from given legislative action, the zone test is satisfied when "Congress ha[s] arguably legislated against the competition that the [plaintiff seeks] to challenge." *Investment Co. Institute*, 401 U.S. at 620. See *Arnold Tours*, 400 U.S. at 46; *Data Processing Organizations*, 397 U.S. at 155-156. As the Court subsequently explained, its holdings in those cases amounted to a conclusion that Congress, in the Bank Service Corporation Act, "*had*

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complex calculations about the effect of given banking practices on the competitive equality of state and national banks. See generally *Independent Bankers Ass'n* v. *Marine Midland Bank*, 757 F.2d 453, 459-461 (2d Cir. 1985), petition for cert. pending, No. 84-2023; *Colorado ex rel. State Banking Board* v. *First National Bank*, 540 F.2d 497, 500 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977). When, as in this case, the party bringing the challenge is not a participant in that competition, the record is less likely to contain adequate evidence bearing on what, if any, competitive effect the Comptroller's decision will have on state banks. Cf. *Bender*, slip op. 7.

[13] Section 1864 provides that "[n]o bank service corporations may engage in any activity other than the performance of bank services for banks."

provided competitor standing." *United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974) (emphasis added). See *Investment Co. Institute*, 401 U.S. at 641 (Harlan, J., dissenting); *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1115.[14] Cf. *Pierce County*, slip op. 7 n.7.

Indeed, it was central to the Court's holding in those cases that the Bank Service Corporation Act had not been designed for the purpose of benefitting only a single group of bank competitors. The Court in *Arnold Tours* thus suggested that travel agents might have been foreclosed from bringing suit had there been "any legislative history showing that Congress desired to protect data processors alone from competition." 400 U.S. at 46 (footnote omitted). And the Court in *Data Processing Organizations* reaffirmed the holding of *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968), that a litigant may bring suit when he is "within the class of persons that the statutory provision was designed to protect." 397 U.S. at 155.[15] See *Glass Packaging Institute*, 737 F.2d at 1089.

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[14] The Court reached a similar conclusion in *Investment Co. Institute*, where it held that securities dealers had standing to contest rulings under the Glass-Steagall Act, a statute enacted to protect the public as a whole against the dangers that arise from the mixture of commercial and investment banking (see *Investment Co. Institute*, 401 U.S. at 639); the Court in that case found that "Congress had arguably legislated against the competition that the petitioners sought to challenge." *Id.* at 620. The Court used the same analysis in holding that a challenge to a burden on interstate commerce fell within the zone of interests protected by the Commerce Clause. *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 818, 320-321 n.3 (1977). See *Tax Analysts & Advocates*, 566 F.2d at 142.

[15] The Court explained in *Hardin* that "competitive injury provide[s] no basis for standing" when "the statutory * * *

Here, as we explain above, there is no doubt that Congress had only one type of competitive injury in mind when it passed the Act—the type that national and state banks might inflict upon each other. Compare *Barlow*, 397 U.S. at 164-165. In these circumstances, there is no reason to depart from the congressional purpose, particularly when doing so would simply afford respondent's members a windfall and unintended protection from the normal competition of the marketplace. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). Instead, "[w]here Congress has * * * clearly defined the class to be protected, the zone test * * * prevent[s] groups outside of the class from usurping the legislative entitlement." *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1115. See *Branch Bank & Trust Co.*, 786 F.2d at 626; *Bank Stationers Ass'n*, 704 F.2d at 1235-1236; *Dialysis Centers*, 657 F.2d at 138; *In re Swearingen Aviation Corp.*, 605 F.2d 125, 127 (4th Cir. 1979); *Rodeway Inns*, 541 F.2d at 766; Jaffe, *supra*, 84 Harv. L. Rev. at 634. Cf. *Community Nutrition Institute*, 467 U.S. at 346-347.

This case differs from *Data Processing Organizations* and *Arnold Tours* in another respect as well. Had the plaintiffs in either of those cases been held to be outside the zone of interests, judicial review of the agency action would have been effectively precluded because no other party would have been entitled to bring suit. While that circumstance was not, of itself, sufficient to require a finding that the

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requirements that the plaintiff [seeks] to enforce were in no way concerned with protecting against competitive injury." 390 U.S. at 5-6.

plaintiffs had standing to sue (see *Valley Forge*, 454 U.S. at 489), in determining whether a litigant is within the congressionally intended zone of interests a court may properly consider whether its ruling would "effectively frustrate any challenge to the regulations in question." *National Ass'n of Securities Dealers*, 420 F.2d at 108 (Burger, J., concurring). See also Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 472 (1974). Here, of course, denying respondent standing would not preclude judicial review of the Comptroller's branching decisions: state banks (and other national banks) historically have been vigilant in policing the Comptroller's application of the Act.[16] Cf. *National*

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[16] See *Plant City*, 396 U.S. at 129; *Walker Bank*, 385 U.S. at 255-256; *Independent Bankers Ass'n of America* v. *Heimann*, 627 F.2d 486 (D.C. Cir. 1980); *State Bank* v. *Heimann*, 619 F.2d 679 (7th Cir. 1980); *State Bank* v. *Merchants National Bank & Trust*, 593 F.2d 341 (8th Cir. 1979); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976); *Driscoll* v. *Northwestern National Bank*, 484 F.2d 173 (8th Cir. 1973); *Hempstead Bank* v. *Smith*, 540 F.2d 57 (2d Cir. 1976); *First National Bank* v. *Camp*, 465 F.2d 586 (D.C. Cir. 1972), cert. denied, 409 U.S. 1124 (1973); *Springfield State Bank* v. *National State Bank*, 459 F.2d 712 (3d Cir. 1972); *North Davis Bank* v. *First National Bank*, 457 F.2d 820 (10th Cir. 1972); *Ramapo Bank* v. *Camp*, 425 F.2d 333 (3d Cir.), cert. denied, 400 U.S. 828 (1970); *Ohio Bank & Savings Co.* v. *Tri-County National Bank*, 411 F.2d 801 (6th Cir. 1969); *Union Savings Bank* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964); *First-Citizens Bank & Trust Co.* v. *Camp*, 409 F.2d 1086 (4th Cir. 1969); *Mid-West National Bank* v. *Comptroller of the Currency*, 296 F. Supp. 1223 (N.D. Ill. 1968); *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), aff'd, 278 F.2d 871 (1960).

Ass'n of Securities Dealers, 420 F.2d at 106 (Burger, J., concurring).[17]

B. Offices Of National Banks That Offer Only Discount Brokerage Services Are Not Branches Under The McFadden Act

The court of appeals also seriously erred in holding on the merits that national bank offices offering only discount brokerage services are branches within the meaning of Section 36(f). That holding will have a substantial and disruptive effect on the Na-

[17] Respondent is not an appropriate party to advance the claims of state banks; "[n]o relationship, other than an incidental congruity of interest, is alleged to exist between" securities dealers and state banks. *Warth*, 422 U.S. at 510; see *id.* at 499. Similarly, although respondent had standing to raise (see note 3, *supra*) its Glass-Steagall claim (see *Investment Co. Institute*, 401 U.S. at 620), it cannot " 'borrow' the arguable regulatory or protective intent embodied in one [statute], and apply it to a [statute] where that intent is not evident, in order to satisfy the zone test." *Tax Analysts & Advocates*, 566 F.2d at 141. As this Court has made clear, standing "turns on the nature and source of the claim asserted" (*Warth*, 422 U.S. at 500), and "the source of plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing" (*ibid.*). Thus, "the particular statutory section [at issue] should be the focus of analysis when applying the zone test." *Tax Analysts & Advocates*, 566 F.2d at 141. See Pet. App. 7a (Scalia, J., dissenting). Indeed, the Glass-Steagall and McFadden Acts implicate wholly different policies and interests. The Glass-Steagall Act was intended generally to separate the business of commercial banking from the business of investment banking. See, *e.g.*, *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 6-10. The geographical restrictions imposed by the McFadden Act, in contrast, established a policy of competitive equality for national and state banks in regard to branching.

tion's banking industry. It throws into question the propriety of the more than 60 applications from national banks seeking permission to engage in the discount brokerage business that currently are pending before the Comptroller. And because discount brokers charge low commissions and depend for their profits on a high volume of business (cf. *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2; Pet. App. 11a), the court of appeals' ruling raises substantial practical barriers to the ability of national banks to compete with brokerage houses that are not subject to geographical limitations.

The court of appeals' construction of the Act also creates anomalous and disruptive distinctions *within* the banking industry. Under this Court's decision in *Securities Industry Ass'n* v. *Board of Governors*, *supra*, bank holding companies may offer discount brokerage services that are not subject to geographical restrictions. But that ruling cannot benefit the smaller and medium-sized national banks that are not affiliated with holding companies. The decision below, moreover, casts a cloud of uncertainty over the authority of *all* national banks to continue operating, without regard to the Act's branching restrictions, the hundreds of bank offices that offer nonbanking services to the public on an interstate basis (see pages 36-37, *infra*). Despite its wide impact, however, the court of appeals' ruling on the merits—which flatly rejected the reading of the statute by the agency charged with its administration—cannot be reconciled with the plain language of the Act, with its legislative history, or with settled practice in the banking industry.

1. a. This Court repeatedly has held "that the starting point for interpreting a statute is the lan-

guage of the statute itself[, and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6. Here, the controlling statutory provision specifically defines the term " 'branch' * * * to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which *deposits are received, or checks paid, or money lent.*" 12 U.S.C. 36(f) (emphasis added). As the Comptroller explained in detail (Pet. App. 39a-43a), discount brokerage offices perform none of these functions—and therefore cannot be deemed to be branches within the meaning of Section 36(f). When the statute speaks with such specificity, there is no room for the courts to substitute a different definition for the one chosen by Congress. See *Dimension Financial Corp.*, slip op. 6-7, 12; *United States* v. *Sisson*, 399 U.S. 267, 297-298 (1970). This is especially so when, as here, the agency administering the Act consistently has adhered to the statute's definitional terms.

Because the statute uses the word "include," the courts below evidently reasoned that the three enumerated functions that characterize a branch—receiving deposits, paying checks, and making loans —were intended by Congress only to be illustrative (see Pet. App. 26a-27a). Given the structure of the statutory definition, however, the approach taken below plainly is a misreading of Section 36(f): "[t]he term 'include' * * * does not relate to the activities involved but refers to the *places* at which the specified activities of receiving deposits, paying checks

and lending money are carried out. The places may include branch banks, branch offices, branch agencies, additional offices, mobile trucks [and] electronic devices." *Continental Illinois National Bank* v. *Illinois ex rel. Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976), slip op. 17-18 (emphasis added) (*reprinted in* Gov't C.A. Br. Addendum C). The statutory language thus should have been dispositive.

b. The courts below nevertheless reasoned that the Act's legislative history justified their refusal to apply what they acknowledged to be the Comptroller's "literal reading of the statute" (Pet. App. 25a). In fact, however, the legislative background, to the extent that it sheds any light at all on the issue here, supports the conclusion that bank offices are subject to the Act's branching restrictions only when they perform one of the three functions enumerated in Section 36(f). Debate on the Act centered almost exclusively on the concern, expressed by both proponents and opponents of liberalized branching laws, that national banks might obtain monopoly control over "credit and money" if permitted to branch. 66 Cong. Rec. 4438 (1925) (remarks of Sen. Reed). See, *e.g.*, *id.* at 1569 (remarks of Rep. Nelson); *id.* at 1582 (remarks of Rep. McFadden); *id.* at 1624-1625 (remarks of Rep. Goldsborough); *id.* at 1628-1629 (remarks of Rep. Stevenson); *id.* at 1633 (remarks of Rep. Williams); *id.* at 1637 (remarks of Rep. Hull); *id.* at 1647 (remarks of Rep. Wingo); *id.* at 4437, 4506 (remarks of Sen. Reed); *id.* at 4527 (remarks of Sen. Heflin); 67 Cong. Rec. 2832 (1926) (remarks of Rep. McFadden); *id.* at 2839 (remarks of Rep. Goldsborough); *id.* at 2844 (remarks of Rep. Nelson); *id.* at 2850 (remarks of Rep. Steagall). It is, of course, through the receiving of deposits, cash-

ing of checks, and making of loans that the money supply and credit are controlled; not surprisingly, then, the congressional discussion about the appropriate scope of restrictions on branching referred only to bank offices that performed these functions. See, *e.g.*, 66 Cong. Rec. 1628 (1925) (remarks of Rep. Stevenson); *id.* at 4433 (remarks of Sen. Shipstead); *id.* at 1633 (remarks of Rep. Williams); *id.* at 4527 (remarks of Sen. Heflin); 67 Cong. Rec. 2855 (1926) (remarks of Rep. Kurtz).[18]

In contrast, during the three years that the Act was under consideration (see 66 Cong. Rec. 1581 (1925) (remarks of Rep. McFadden)), no suggestion was made that its branching restrictions would affect the *nonbanking* activities of national banks. And this omission was significant. Shortly after the enactment of the National Bank Act in 1864, this Court held that national banks *were* empowered to conduct

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[18] There is considerable evidence in the legislative history that the specific language of Section 36(f) was chosen as a response to the development of so-called "teller's windows," which were operated by national banks away from their main offices. While the legality of the teller's windows was far from clear (see generally *First National Bank* v. *Missouri*, *supra*; 67 Cong. Rec. 2860 (1926) (remarks of Rep. Celler)), the windows were used by many national banks in the 1920's to "pay checks and receive deposits." 66 Cong. Rec. 1627 (1925) (remarks of Rep. Stevenson); see *id.* at 4433 (remarks of Sen. Shipstead); 67 Cong. Rec. 2860 (1926) (remarks of Rep. Celler); 34 Op. Att'y Gen. 1, 5 (1923). Proponents of the Act explained that Section 36(f) was drawn in such a way as to treat the teller's windows—which were offering essential banking services—as branches. See 66 Cong. Rec. 1628 (1925) (remarks of Rep. Stevenson); *id.* at 1647 (remarks of Rep. Stevenson); *id.* at 4432 (remarks of Sen. Pepper); 67 Cong. Rec. 2860 (1926) (remarks of Rep. Stevenson).

operations that were incidental to the banking business away from their main offices. *Merchants' Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604, 651 (1870). See also *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87 (1911). Banks subsequently developed a substantial volume of such business—including, very notably, the buying and selling of securities. See pages 31-33, *infra*. As a statute generally designed to liberalize branching rules, it is hardly likely that the McFadden Act was intended, for the first time, to subject offices conducting these activities to regulation as branches.

c. The legislative background also makes plain that the omission of brokerage operations from the functions enumerated in Section 36(f) could not have been an oversight. At the time of the Act's enactment in 1927, "[i]t [was] a matter of common knowledge that national banks [had] been engaged in the investment-securities business * * * for a number of years." H.R. Rep. 83, *supra*, at 2. See S. Rep. 473, *supra*, at 7. Representative McFadden himself acknowledged that the buying and selling of securities had "become a recognized service which a bank must render." 66 Cong. Rec. 1585-1586 (1925) (remarks of Rep. McFadden).[19] Similarly, Congress was aware that these securities activities were not subject to the National Bank Act's bar on branching, and thus were conducted "to a very large extent

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[19] In testimony before the Senate Banking Committee, Representative McFadden explained that "national banks have for many years been engaged in the business of buying and selling investment securities without any restrictions whatsoever." *Consolidation of National Banking Associations: Hearings on S. 1782 and H.R. 2 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 69th Cong., 1st Sess. 22 (1926).

throughout the country." 67 Cong. Rec. 8351 (1926) (remarks of Sen. Pepper).[20]

Yet in the same legislative package in which it defined the term "branch" and established Section 36 (c)'s branching rules, Congress specifically confirmed the authority of national banks—previously exercised under their "incidental charter powers" (H.R. Rep. 83, *supra*, at 3)—"to continue to engage in the business of buying and selling investment securities." S. Rep. 473, *supra*, at 7. See Act of Feb. 25, 1927, ch. 191, § 2, 44 Stat. 1226[21]; H.R. Rep. 83, *supra*, at 2, 3. Had Congress intended to require that these activities be carried out only at licensed branches in the bank's state of incorporation, it presumably would have said so (cf. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716, 721 (8th Cir. 1976) (Henley, J., dissenting), cert. denied, 433 U.S. 909 (1977)); that Congress discussed the securities business in one section of the statute while pointedly omitting it from Section 36(f) strongly indicates that

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[20] As these remarks indicate, bank involvement in the securities business prior to passage of the Act was widespread and often was conducted on an interstate basis. See, *e.g.*, W. Peach, *The Security Affiliates of National Banks* 74 (1941); Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 492, 494 n.26 (1971). See also *Block* v. *Pennsylvania Exchange Bank*, 253 N.Y. 227, 232-233, 170 N.E. 900, 901-902 (1930).

[21] The legislation authorized national banks to engage in "the business of buying and selling investment securities." Banks were limited to buying and selling the securities "without recourse," and were prohibited from acquiring the securities of any one issuer in an amount that exceeded 25% of the bank's capital stock (§ 2, 44 Stat. 1226).

the omission was intentional.[22] See generally *Lawrence County* v. *Lead-Deadwood School District*, No. 83-240 (Jan. 9, 1985), slip op. 10; *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981); *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981); *Bates* v. *Brown*, 72 U.S. (5 Wall.) 710, 718 (1866). And again, there is no reason to assume that a statute designed both to confirm the authority of national banks to engage in the securities business and to liberalize branching rules also contained an unspoken intent to curtail dramatically the securities operations of those banks.[23]

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[22] That the Act was not intended to subject bank brokerage activities to geographic restrictions is demonstrated by its immediate effect: in the years after passage of the Act, banks continued to open and operate interstate securities offices. See W. Peach, *The Securities Affiliates of National Banks* 96-98 (1941). See also *Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1057 (1931). Although Congress was aware of this activity (see *ibid.*), it took no steps to restrict the locations at which banks could operate securities businesses when, in enacting the Glass-Steagall Act in 1933, it limited the *types* of securities activities in which banks could engage by separating investment from commercial banking. See 12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378. To the contrary, Congress emphasized that the Glass-Steagall Act permitted banks "to purchase and sell investment securities for their customers to the same extent as heretofore." S. Rep. 77, 73d Cong., 1st Sess. 16 (1933). See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 7.

[23] The district court's analysis of the legislative history was limited to consideration of a single post-enactment statement by Rep. McFadden, to the effect that "'[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money,

d. The courts below also felt free to disregard the Comptroller's construction of Section 36(f) because they found it inconsistent with this Court's statement in *First National Bank in Plant City* v. *Dickinson*, *supra* (see Pet. App. 26a-27a) that

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or *transacting any business carried on at the main office*, is a branch * * *' " (Pet. App. 26a, quoting 68 Cong. Rec. 5816 (1927) (remarks of Rep. McFadden) (emphasis added by the court)). But the district court's reliance on this statement—which was inserted into the record 10 days after passage of the Act, while Congress was in adjournment—disregarded this Court's "oft-repeated warning that [post-enactment statements] form a hazardous basis for inferring" the intent of Congress. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 823 (1980). The language of the McFadden Act—like that of much legislation—"reflect[s] hard fought compromises." *Dimension Financial Corp.*, slip op. 12. See 66 Cong. Rec. 4526 (1925) (remarks of Sen. Pepper); *First National Bank of Logan*, 385 U.S. at 257-260. To allow Rep. McFadden's post-enactment statement to override the statutory language "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 14. And there are especially compelling reasons here to be skeptical of Representative McFadden's statement. While the branching statute bears his name, Representative McFadden was in fact a determined opponent of branch banking, who would have required state banks to relinquish statewide branches and imposed significant limitations on branching by national banks. See 67 Cong. Rec. 2829, 2832 (1926) (remarks of Rep. McFadden). He thus had a clear interest in adding to the legislative record a broad definition of the term "branch." Indeed, Rep. McFadden's post-enactment remarks primarily demonstrate how easy it would have been for Congress to have adopted an all-encompassing definition of "branch" had it wished to do so.

> [a]lthough the definition [in Section 36(f)] may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135 (emphasis in original). The Court in *Plant City* then held that two off-premises banking services owned and operated by a national bank—an armored car messenger service that received cash and checks for deposit and a stationary receptacle for customer deposits (see *id.* at 125-129)—were branches within the meaning of Section 36(f) because they "received * * * deposit[s]" (396 U.S. at 137).

On close examination, it is plain that the Comptroller's analysis here is entirely consistent with *Plant City*. To the extent that the language quoted above leaves open the possibility that branches may include bank offices other than those performing one of the three enumerated functions, the Court expressly declined to resolve the issue; its opinion was explicitly "confine[d] * * * to the question of whether deposits were received" at the challenged off-premises facilities (396 U.S. at 135). Indeed, if the Court had meant to hold that all bank offices are branches, its extensive consideration of the question whether the facilities at issue received deposits would have been unnecessary. See *id.* at 135-138.

Insofar as the *Plant City* dictum is relevant at all, then, it should be deemed "virtually dispositive in favor of the Comptroller" (Pet. App. 8a) (Scalia, J.,

dissenting) (emphasis omitted)). As Judge Scalia noted, a statute "containing a 'calculated indefiniteness' presents precisely the situation in which [a court's] deference to the agency should be at its height" (*ibid.*). See generally *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 7-8; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 56 & n.21 (1981). And the "Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness —or indeed that the range includes *only* the enumerated functions—cannot by any means be considered unreasonable" (Pet. App. 8a-9a (emphasis in original)).

The deference due the Comptroller is reinforced by the fact that the court of appeals' novel reading of the statute would disrupt long settled practice in the banking industry. For many years, the Comptroller has permitted national banks to operate loan production offices, government and municipal securities offices, trust offices, credit card and record facilities, and similar operations—which do not carry on any of the three functions enumerated in Section 36(f) —on an interstate basis, without regard to the Act's branching limitations. See Pet. App. 44a. See generally 12 C.F.R. 7.7380; Whitehead, *Regional Forces for Interstate Banking*, Fed. Res. Bank of Atlanta Econ. Rev. 4, 17-18 (1983); Glidden, *The Regulation of National Banks' Subsidiaries*, 40 Bus. Law. 1299, 1304, 1315 (1985). See also page 37 & note 24, *infra*. Indeed, as of 1983, banks operated more than 200 loan production offices interstate. See Whitehead, *supra*, Fed. Res. Bank of Atlanta Econ. Rev. at 17.

The decisions below cannot be reconciled with this established practice. In these circumstances, "the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons' " of a sort that plainly have not been advanced here. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978) (quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921)). Cf. *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 21-22.

The legitimacy of these bank activities, moreover, has been confirmed by subsequent congressional action. When Congress was considering the International Banking Act of 1978 (IBA), Pub. L. No. 95-369, 92 Stat. 607 *et seq.*, the interstate operation of loan production offices repeatedly was called to Congress's attention.[24] And Congress specifically acknowledged the use of loan production offices by banks, noting that the existence of these offices and other multistate banking operations meant that "the avenues of interstate activity open to domestic banking organizations are significant." S. Rep. 95-1073, 95th

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[24] See, *e.g.*, 122 Cong. Rec. 24407 (1976) (statement of New York State Banking Department); *International Banking Act of 1977: Hearings On H.R. 7325 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 473-474 (1977) (statement of the Institute of Foreign Banks); *id.* at 556 (statement of George A. LeMaistre, Chairman, Federal Deposit Insurance Corporation); *id.* at 576 (statement of Robert Bloom, First Deputy Comptroller of the Currency); *Foreign Bank Act of 1975: Hearings on S. 958 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 509-510 (1976) (statement of the Institute of Foreign Banks).

Cong., 2d Sess. 8 (1978). See 124 Cong. Rec. 9081 (1978) (remarks of Rep. St Germain); *id.* at 9095 (remarks of Rep. Annunzio); 122 Cong. Rec. 24403 (1976) (remarks of Rep. Stephens). Congress accordingly noted that foreign banks, which are not subject to the McFadden Act's restrictions, had a competitive advantage over domestic banks primarily in that they were permitted "to receive deposits, make loans, and pay checks at banking offices located in several States"—a factor that took on particular importance because "the essence of banking is the ability to receive deposits." S. Rep. 95-1073, *supra*, at 8. See 122 Cong. Rec. 24403 (1976) (remarks of Rep. St Germain).

While Congress took steps in the IBA to assure the competitive equality of foreign and domestic banks (see 124 Cong. Rec. 9081 (1978) (remarks of Rep. St Germain); *id.* at 9082 (remarks of Rep. Reuss); *id.* at 9099 (remarks of Rep. Rousselot))—and simultaneously commissioned a study on the McFadden Act's applicability to "the present financial, banking, and economic environment" (§ 14(a), 92 Stat. 625)—it took no action to disapprove the multistate operation by national banks of offices conducting a nonbanking business. This sort of congressional acquiescence in the Comptroller's administrative practice suggests that the agency's interpretation of the scope of the Act's branching restrictions should be deemed authoritative. See, *e.g.*, *Connecticut Department of Income Maintenance* v. *Heckler*, No. 83-2136 (May 20, 1985), slip op. 7, 13; *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

2. Even if the three functions enumerated in Section 36(f) are not the only ones that characterize branches, the courts below erred in holding that *all*

operations undertaken by banks—including *nonbanking* operations such as discount brokerage—must be conducted at branches. The three functions enumerated in Section 36(f), if not wholly dispositive, must have at least some bearing on the definition of the term "branch"; their inclusion in the statute otherwise would have been wholly superfluous. See *Exxon Corp.* v. *Hunt*, No. 84-978 (Mar. 10, 1986), slip op. 14; *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, No. 84-262 (June 10, 1985), slip op. 11.[25] What those functions have in common, of course, is each one's status as a "basic bank[ing] service[]" (*Plant City*, 396 U.S. at 137). See *Melton* v. *Unterreiner*, 575 F.2d 204, 207 n.4 (8th Cir. 1978) ("While many banks today perform a large number of services, basically the business of 'banking' consists of accepting deposits, cashing checks, discounting commercial paper, and making loans of money."); *Leuthold* v. *Camp*, 273 F. Supp. 695, 700 (D. Mont. 1967), aff'd, 405 F.2d 499 (9th Cir. 1969). As a result, courts have characterized the test of a branch

[25] The district court thus erred in suggesting (Pet. App. 28a) that 12 U.S.C. 81—which provides that "[t]he general business of each national banking association shall be transacted in [its main office] * * * and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title"—confines all aspects of a bank's business to its main office or its branches. Such a reading renders Section 36(f) superfluous, and disregards Section 81's incorporation by reference of Section 36. In fact, Section 81 simply limits the places at which a bank may carry on its "general business," rather than the places at which it may conduct any of its business. See *Lowry National Bank*, 29 Op. Att'y Gen. at 87-88 (the "cases clearly indicate * * * a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business").

as whether the office at issue performs "routine banking function[s]" (*Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 178 (7th Cir.), cert. denied, 429 U.S. 871 (1976)) or "traditional banking transaction[s]." *Colorado ex rel. State Banking Board* v. *First National Bank*, 540 F.2d 497, 500 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977). See also *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 943 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). Against this background, as the Comptroller explained, even the broadest reading of Section 36(f) must "at the very least be limited to those dealings with the public requiring a specialized banking or similar license" (Pet. App. 43a-44a).[26]

This distinction between basic bank services and the more peripheral activities that are performed by banks has been recognized in other contexts by Congress and the Court. In 12 U.S.C. (Supp. II) 24 Seventh, for example, Congress specifically included within the definition of the "business of banking" "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * *

[26] Although several courts have used broad language in describing the definition of "branch," to our knowledge only one court has held that a bank office performing a function other than one of the three enumerated in Section 36(f) is a branch. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), cert. denied, 433 U.S. 909 (1977). In *St. Louis County National Bank*, a divided panel of the Eighth Circuit held that bank trust offices are subject to branching restrictions. While we believe that this decision was incorrect, it has an arguable basis in the fact that trust offices—unlike discount brokerage offices—do require the issuance of a special banking license from the Comptroller. See 12 U.S.C. 92a; 548 F.2d at 719-720.

receiving deposits; * * * buying and selling exchange, coin, and bullion; * * * loaning money on personal security; and * * * obtaining, issuing, and circulating notes." Cf. *Melton*, 575 F.2d at 207 n.4. The brokerage business is not included on this list of traditional banking activities. To the contrary, the next sentence of 12 U.S.C. (Supp. II) 24 Seventh separately authorizes national banks to undertake, to a limited extent, the "business of dealing in securities and stock." Similarly, this Court has upheld the right of bank holding companies to acquire discount brokerage firms under the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*) because discount brokerage is a *nonbanking* activity that is " 'closely related' to banking." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8 (quoting 12 U.S.C. 1843(c)(8)).

There is thus little doubt that discount brokerage is not a traditional banking service. It could not seriously be suggested, for example, that Brenner Steed prior to its acquisition by Union Planters—or, for that matter, that respondent's members—engaged in the banking business by offering brokerage services. And the character of Brenner Steed's operations was not altered by its acquisition by Union Planters. In these circumstances, the Comptroller has set forth his reading of the statute with "commendable thoroughness" (*Securities Industry Ass'n*, No. 83-614, slip op. 8) and drawn a careful distinction between traditional bank services and discount brokerage operations (Pet. App. 43a-44a). This analysis should have been respected by the courts below.[27]

[27] In rejecting the Comptroller's distinction and holding that *all* bank activities must be conducted at the bank's main office or its licensed branches, the court of appeals' decision

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT M. KIMMET
General Counsel
Department of the Treasury

RICHARD V. FITZGERALD
Chief Counsel

EUGENE M. KATZ
MARK L. LEEMON
Attorneys
Office of the Comptroller of the Currency

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
NICHOLAS S. ZEPPOS
Attorneys

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imposes restrictions on national banks that were rejected by this Court more than 100 years ago. As noted above (at 19-20), the National Bank Act of 1864 originally limited a bank's conduct of its general business to its main office. In *Merchants' Bank* v. *State Bank, supra,* however, this Court flatly rejected the notion that *all* banking activities are confined to the bank's main office. The Court held that a national bank may certify a check away from its main office, reasoning that "[t]he business of every bank, away from its office * * * is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents." 77 U.S. (10 Wall.) at 651. Similarly, in *First National Bank* v. *Missouri, supra,* the Court cited with approval the Attorney General's "well considered opinion" (263 U.S. at 658) in *Lowry National Bank,* which had recognized that "[the] cases clearly indicate * * * a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." 29 Op. Att'y Gen. at 87.

APPENDIX

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 36(c) provides:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. 36(f) provides:

> The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. 81 provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20223

No. 85-971 and 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,

—v.—

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

—v.—

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

JAMES B. WEIDNER
Counsel of Record
DAVID A. SCHULZ
MARK HOLLAND
PETER KOHN, JR.
NANCY S. LEGOW
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8233
Attorneys for Respondent

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Based on its long-standing concerns over the concentration of economic power, Congress always has restricted both the substance and location of national bank activities. The National Bank Act authorizes a national bank to engage only in specifically defined activities (12 U.S.C. § 24) and to conduct "general business" only at "the place specified in its organization certificate" or at those intrastate "branches" permitted by state law (12 U.S.C. § 81). The Comptroller of the Currency found that certain securities brokerage activities were authorized as part of the general business of national banks, but nevertheless ruled those activities were not subject to the geographic restrictions upon that business. The courts below found the Comptroller's locational ruling contrary to law and declared it null and void.

1. Did the courts below correctly hold that brokerage operations, as part of the statutorily authorized business of a national bank, are subject to the geographic restrictions that apply to "the general business" of all such banks?

2. Did the courts below correctly hold that securities brokers injured by bank competition against which Congress arguably legislated have standing to challenge the Comptroller's permissive ruling in that respect?

PARTIES TO THE PROCEEDINGS BELOW

Respondent Securities Industry Association ("SIA") was the plaintiff-appellant-cross-appellee below.* Defendants-appellees-cross-appellants below were C.T. Conover, then Comptroller of the Currency of the United States, and the Office of the Comptroller of the Currency. Petitioner Robert L. Clarke now serves as Comptroller of the Currency. Petitioner Security Pacific National Bank was permitted to intervene by the Court of Appeals after entry of the panel opinion.

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* Pursuant to Rule 28.1 of this Court, respondent states as follows: The Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for more than 90 percent of the securities brokerage and investment banking business in the United States.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

A. The Administrative Proceedings

On August 26, 1982, the Comptroller of the Currency ("Comptroller") permitted Security Pacific National Bank to open securities brokerage offices throughout its home state of California and across the country. (30a.)[1] Conducted through an operating subsidiary, the offices would among other things "solicit and service new customers and provide local locations for the receipt of securities."[2] On September 20, 1982, the Comptroller approved the application of Union Planters National Bank of Memphis to acquire a broker engaged in securities brokerage in Tennessee and six other states, and to continue to conduct that business across state lines. (47a.)

In approving these applications, the Comptroller ruled that the National Bank Act of 1864, as amended, included securities execution services (*i.e.*, securities brokerage alone, offered without investment advice) as part of the business statutorily allowed to national banks. Even so, the Comptroller ruled that *this* bank activity is not subject to the geographic restrictions otherwise imposed by statute on the general business of all national banks. (39a-45a.)

Those geographic restrictions are set forth in 12 U.S.C. § 81 (hereafter "Section 81") and 12 U.S.C. § 36 (hereafter "Section 36").[3] Section 81, the fundamental geographic restriction

1 The Court has granted the consent motion filed by the Solicitor General to dispense with printing the joint appendix. 106 S. Ct. 2271 (1986). The opinions and relevant portions of the record below are included in the appendices annexed to the Federal Petitioner's Petition for a Writ of Certiorari filed on December 9, 1985. Citations to material printed in those appendices appear as "____a."

2 Comptroller of the Currency, Administrative Record, Application dated June 10, 1982 by Security Pacific National Bank to Establish an Operating Subsidiary 58-59, *reprinted in* Joint Appendix at A-155-56, *Securities Industry Ass'n* v. *Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985).

3 The relevant text of these provisions is set forth in the Statutory Appendix annexed hereto.

upon national bank activities, limits "the general business" of a national bank to its headquarters and any "branches" permitted by Section 36. Section 36, in turn, permits national banks only to establish intrastate branches and only to the extent allowed by state law.

In concluding that these geographic restrictions do not apply to brokerage services conducted by banks, the Comptroller reasoned that a "branch" exists under Section 36 only where deposits are received, checks paid or money lent. (44a.) Finding that securities brokerage does not directly involve any of these three specific activities, the Comptroller reasoned that the locations where brokerage alone is conducted would not be "branches." Omitting any mention at all of the fundamental single-office restriction in Section 81, the Comptroller concluded that national banks may locate those functions at any location they choose. (45a.)

On October 26, 1982 the SIA, a national trade association whose members are responsible for more than ninety percent of the securities brokerage business in the United States, commenced this action for declaratory and injunctive relief, challenging the Comptroller's novel ruling.

B. The Opinions Below

On cross-motions for summary judgment, the district court first upheld the standing of the SIA to challenge the Comptroller's ruling. The district court concluded that, through the geographic restrictions, Congress arguably had legislated against the bank competition the SIA sought to prohibit. As the court put it, Section 81 of the National Bank Act, together with the Section 36 branching limits, "evince the intent of Congress to curb the scope of national banks' activities." (577 F. Supp. at 258, 24a.) Relevant competitive injury-in-fact to the SIA's members also having been established, the court confirmed the SIA's standing in this litigation. (577 F. Supp. at 258-59, 24a.)

Turning to the merits, the court found securities execution services to be an authorized part of "the general business" of national banks, and as such subject to the geographic restrictions imposed by Congress on that business. (577 F. Supp. at 260, 29a.) Relying upon the statutory language, legislative history and settled precedent, the district court held that brokerage activities are subject to the restrictions of Section 36, just as are other bank activities aimed at "attracting and servicing customers conveniently." (577 F. Supp. at 261, 29a.)

The district court also rejected the Comptroller's argument that Section 36 restricts only intrastate activities, so that banks would be free in any event to conduct activities outside of their home state. As the court explained, the Comptroller's analysis

> ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the locations of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintain offices outside their home state.

(577 F. Supp. at 260, 28a.)

On cross-appeals the Court of Appeals, with a dissent, affirmed the district court in a *per curiam* opinion, "generally for the reasons stated [by the district court]." (758 F.2d 739, 740, 1a, 2a.) On July 12, 1985, the Court of Appeals denied petitioners' requests for rehearing and suggestions for rehearing *en banc*. (765 F.2d 1196, 5a.) The Comptroller and Security Pacific filed separate Petitions for a Writ of Certiorari.[4] The Court granted those petitions on March 3, 1986. 106 S. Ct. 1259 (1986).

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4 On September 9, 1985, the SIA petitioned for a Writ of Certiorari to review the issue of whether national banks may conduct securities execution services at all. The Court denied that petition on January 13, 1986. *Securities Industry Ass'n* v. *Comptroller of the Currency*, 106 S. Ct. 790 (1986).

SUMMARY OF ARGUMENT

1. The fundamental restriction on the location of national bank operations is set forth at 12 U.S.C. § 81 ("Section 81"). Enacted over a century ago, that provision as amended restricts "the general business" of any national bank to its main office and to permitted branches located within the same state. The Comptroller found that certain brokerage operations are authorized as part of a national bank's business. Even so, his ruling permitted banks to locate those operations at *any* site they choose, regardless of the geographic restrictions on their business. Thus contravening the plain language of Section 81, the ruling for this reason alone was correctly voided below.

2. The history of Section 81 underscores its applicability. That section originally had limited the "*usual* business" of each national bank to a single office. In 1927 Congress changed that phrase to limit the location of each bank's "*general* business," while also permitting that business to be conducted at branches in addition to the main office. As part of the same statute, Congress for the first time recognized the authority for national banks to engage in buying and selling investment securities.

There is no indication that, in modifying Section 81 to limit the locations of "the general business" of a national bank in 1927, Congress intended in any way to exclude from that limitation the securities activities simultaneously authorized for banks. To the contrary, the absence of any statutory definition of "the general business" compels the conclusion that its ordinary, all-encompassing meaning was intended by Congress. Certainly the geographic restriction of that phrase covers *at least* those activities Congress expressly authorized for banks in the National Bank Act, including the brokerage activities involved here.

3. The interstate securities activities of banking organizations during 1920-30, cited by petitioners, are immaterial to the issue here. Those activities were conducted, not by banks organized under the National Bank Act, but by separate, non-subsidiary *affiliates* of those banks. The locational restrictions of that Act, however, generally apply only to banks and not to such affiliates. Also, the Comptroller has made clear that all laws, including geographic restrictions, that apply to national banks apply equally to operating subsidiaries, such as those involved here.

4. Because Section 81 is dispositive, it is unnecessary even to reach definitional questions concerning a bank "branch" under 12 U.S.C. § 36 ("Section 36"). Remarkably, however, the Comptroller's ruling ignored Section 81 entirely and instead focused solely on the definition of a "branch." The Comptroller reasoned that the term "branch" does not "include" more than the three functions enumerated in Section 36(f) (accepting deposits, cashing checks or loaning money). Because securities brokerage is not one of those functions, the Comptroller concluded that it can be located wherever banks choose. The ruling contravened logic, legislative intent and legal precedent.

a. The Comptroller's branching ruling elides the structure of the statute and thereby creates its own logical Catch-22. Section 36 does not stand alone. Rather, its branching provisions were enacted as an exception to the overall limitation of Section 81 that otherwise restricts a national bank's business solely to its main office. Taking the statutory structure into account, the Comptroller's rationale actually leads to the opposite result: If, as the Comptroller ruled, a "branch" would exist *only* where one of the three enumerated functions is performed, it follows that a branch could not exist *unless* one of those three functions were performed there. All other bank activities, however, remain subject to the overall restriction of Section 81. Hence, ex "branch," the other activities such as securities brokerage would be limited solely to the bank's main office and not, as the Comptroller concluded,

freed of any locational restriction whatever. Section 36, as well, contradicts the Comptroller's logic. Its definition of a branch "includes" expressly "*any*" place, which of course covers every place. The section therefore cannot also "include" more *places*, as the Comptroller would read it; rather, the section must "include" more *functions*.

b. The legislative history of the McFadden Act expressly demonstrates that Congress did not intend to limit "branches" to the three functions enumerated. The Conference Committee Report accompanying the Act stated that a national bank could conduct "general business" "not only" at its main office "but also" at branches, thereby making clear that a "branch" is not restricted simply to the three functions listed in the definitional section. Representative McFadden confirmed just that in an analysis this and every other court to have considered the issue have found highly significant. He made clear that the term "branch" encompasses any place where a bank "carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office*."

c. The Comptroller's present interpretation is also contrary to the rationale articulated by every appellate court to have addressed the locational restrictions. This Court, in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 135 (1969), found that the term "branch bank" "includes" at the very least "*any* place" for conducting one of the three enumerated functions and "may include more." The Court of Appeals in *St. Louis County National Bank* v. *Mercantile Trust Co. National Bank*, 548 F.2d 716, 719 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), found that "the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking," and therefore voided the Comptroller's effort to sanction a bank's trust office at an unlicensed location. The Courts of Appeals for the Tenth, Seventh and District of Columbia Circuits have also set forth a similar approach in other cases. The Comptroller's suggestion that

"branch" activities are somehow limited solely to activities requiring a banking or similar license defies the statutory branching definition itself; two of the three functions enumerated in the definition (cashing checks and making loans) require no such license and are carried on by any number of non-bank entities.

5. The Comptroller's ruling is not due deference. The ruling does not address Section 81, the fundamental geographic restriction on bank activities. Arguments presented in this Court on that subject are simply *post hoc* rationalizations by counsel entitled to little deference. Further, the issues here are purely ones of statutory interpretation over which the courts must be the final arbiters. This is not even an instance in which Congress has vested an administrator with relevant rule-making authority; to the contrary, Congress, by statute, has expressly *withheld* any authority for the Comptroller to issue rules or regulations under the provisions at issue.

6. Petitioners concede that the SIA "obviously" has "adequate adversity of interest" under Article III of the Constitution to challenge the Comptroller's ruling but assert nevertheless that the prudential concerns underlying the "zone of interests" rationale should bar this action. The Court, however, has stated that where, as here, a litigant has standing under Article III, such prudential concerns are generally resolved.

Further, the Court articulated the zone of interests rationale to enlarge the class of people who may protest administrative action. The rationale is satisfied when "Congress had *arguably* legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1970) (emphasis supplied); *see Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970). The rationale requires neither express legislative history indicating that Congress intended to protect the specific complainants nor demonstration that Congress had indeed prohibited the competition at issue. *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970).

The Court repeatedly has upheld the standing of non-bank competitors to challenge the Comptroller's rulings permitting expanded bank activities under the National Bank Act, which arguably was intended to prohibit them. Here, too, Congress ("arguably", at the very least) has legislated against the competition sanctioned by the Comptroller, and the complainants, members of the SIA, will suffer competitive harm from the Comptroller's action. That the competitive factor in this case is the location rather than the substance of bank activities is immaterial. The limit in Section 81 on the location of bank activities, together with the limit in 12 U.S.C. § 24 (Seventh) on the nature of those activities, restrict the permissible scope of competition by banks—to the benefit of *all* bank competitors.

Focusing (as did the dissent below) solely on the branching provisions of Section 36, petitioners argue that Congress intended the section only to benefit banks and therefore the SIA has no standing to challenge rulings concerning it. But the branching provisions of Section 36 are a limited exception to the overall main office restriction in Section 81, and, as integrally related parts of the statutory structure, those provisions should be considered together. That Congress relaxed the basic geographic restriction to permit some branching does not eliminate its underlying intent in enacting the basic limit in the first place. And, that intent was to restrict the location of bank competition, arguably to the benefit of competitors such as the SIA.

ARGUMENT

The same fundamental flaw pervades petitioners' analysis *both* as to substance and as to standing. As will appear, petitioners base their entire case almost exclusively on the branching provisions of Section 36 and simply ignore the basic geographic restrictions of Section 81, even though it is equally involved. The structure of the statute, as well as its language and the Congressional intent underlying it, leave no doubt (a) that the Comptroller's ruling is contrary to law and (b) that members of SIA, as competitors of banks in the brokerage business, have standing to challenge that ruling.

I

THE COMPTROLLER'S RULING VIOLATES THE LOCATIONAL RESTRICTIONS OF THE NATIONAL BANK ACT

At bottom, this case rests on a classic have-your-cake-and-eat-it-too contention. Having first succeeded in arguing that discount brokerage *is* a proper part of any national bank's general business, petitioners now contend that, even so, it should be excluded from the strict locational limitations imposed on the general business of every national bank. The courts below rejected this contention and voided the Comptroller's ruling encompassing it. They were correct. The ruling contravened the plain language of the basic geographic restriction on the business of national banks, as well as the Congressional intent in enacting the branching provisions that amended it.

A. The Comptroller's Ruling Contravened the Basic Statutory Restriction on the Location of a National Bank's Business

The fundamental restriction on the location of a national bank's business is codified at 12 U.S.C. § 81. Remarkably, the Comptroller's ruling did not contain one word concerning this provision, and petitioners' present arguments also all but ignore it. The provision is dispositive.

The starting point for all statutory analysis, of course, is the language of the statute itself. *E.g.*, *Bread Political Action Comm.* v. *Federal Election Comm'n*, 455 U.S. 577, 580 (1982). The relevant statutory language here provides that:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

12 U.S.C. § 81. Branches, in turn, may be established as permitted by applicable state law "within the state in which [a national bank] is situated." 12 U.S.C. § 36(c).

The statute is thus clear: national banks may locate their business only at their headquarters or licensed branches within the same state. Yet, even though the Comptroller found discount brokerage to be a proper part of a national bank's business, he permitted banks to establish such operations at any location they choose. Directly at odds with the plain language of the statute, the Comptroller's decision was appropriately voided by the courts below. The Court need go no further. "If the statute is clear and unambiguous, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress'."[5]

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5 *Board of Governors* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986) (quoting *Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also Consumer*

The history of the language in Section 81, however, simply underscores its plain meaning. That language originated with the National Bank Act of 1864, the statute that created and enables the continued existence of national banks.[6] As originally enacted, the section provided:

> The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate.

R.S. 5190, ch. 106, 13 Stat. 101 (1864). As the Court has confirmed, Congress by this limitation restricted national banks to transacting their business at only one location.[7] The

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Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). SIA thus agrees with petitioners that this is a plain language case. Brief for the Federal Petitioner (hereafter "Fed. P.") at 27-29; Brief for Petitioner Security Pacific National Bank (hereafter "Sec. Pac.") at 15-19. But the plain—and controlling—language here is that of Section 81, which petitioners all but ignore, and not that of Section 36, upon which petitioners almost exclusively rely.

6 From the time Congress first chartered the Bank of the United States in 1816, through the creation of the national bank system during the Civil War, to the present, a fundamental tenet of federal policy has been that banks are institutions of limited, statutorily defined powers that have no authority beyond that expressly granted by law. *E.g.*, *California Bank* v. *Kennedy*, 167 U.S. 362, 366 (1897); *First National Bank in St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640, 656 (1924); *Texas & Pacific Ry.* v. *Pottorff*, 291 U.S. 245, 253 (1934). In enacting the McFadden legislation, Congress unquestionably understood that it was proceeding "[u]nder the general theory that a national bank cannot do anything for which it does not have specific authority of law," and that all powers "should be expressly granted." 66 Cong. Rec. 1585 (1925) (statement of Rep. McFadden).

7 *First National Bank in St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640, 656-58 (1924); *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 42-43 (1977). Significantly, the Court expressly held in the *St. Louis* case—shortly before passage of the McFadden Act—that the "multiplication of places where the powers of a bank may be exer-

language of this section remained unchanged for the ensuing six decades, until it was amended in 1927, as part of the McFadden Act, to read as it now does. Through this amendment Congress substituted the broader phrase "the general business" for the phrase "the usual business" of banks and also permitted that business for the first time to be transacted in authorized branches in addition to a bank's main office. McFadden Act, ch. 191, § 8, 44 Stat. 1229 (1927) (codified at 12 U.S.C. § 81).

Significantly, in another part of the McFadden Act, Congress for the first time recognized the authority of banks to engage in the "buying and selling of investment securities" as part of their business. McFadden Act, ch. 191, § 2, 44 Stat. 1226 (1927). *See Awotin* v. *Atlas Exchange National Bank*, 295 U.S. 209 (1935). As petitioners point out (Fed. P. at 31-33; Sec. Pac. at 22-25), the legislative history of the McFadden Act shows that its supporters believed that buying and selling those securities was properly a part of a bank's general business. The Senate Report characterized that activity variously as "a legitimate banking service," a "form of service demanded by banks", and a service "too important to banks to hang by . . . a slender thread of legal interpretation."[8] The Comptroller of the Currency described this activity during hearings on the legislation in 1924 as "additional forms of banking ser-

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cised" does *not*, contrary to petitioners' argument (Fed. P. at 30-31; Sec. Pac. at 21-22), fall within the scope of a bank's "incidental" powers. 263 U.S. at 659. *See* 67 Cong. Rec. 9291 (1926) ("Under the decision of the Supreme Court in the St. Louis case [263 U.S. 640 (1924)], it was held that no national banking association could do anything not specifically permitted by law. . . ." (Statement of Sen. Shipstead). *See also* 66 Cong. Rec. 4524 (1925) ("We have assumed that branch banks may not be established by national banks unless they can point to the letter of authority of the law.") (Statement of Sen. Pepper, member of the Senate Banking Committee, Senate sponsor of the bill and member of the Conference Committee that considered it).

8 S. Rep. No. 666, 68th Cong., 1st Sess. 6 (1924).

vice"[9] and the bill's principal sponsor called it a "recognized service which banks must render."[10]

It simply defies logic to argue that when Congress broadened the express powers of national banks to include the business of buying and selling securities, it did not also intend to include that business within the simultaneously broadened phrase, "the general business" of a national bank, set forth in Section 81. No indication whatever exists that Congress intended to narrow the ordinary meaning of that phrase.[11]

Indeed, the omission of any statutory definition of "the general business" compels the assumption that " 'the legislative purpose is expressed by the ordinary meaning of the words used'." *Securities Industry Ass'n* v. *Board of Governors*, 468

9 *Consolidation of National Banking Associations, Etc.: Hearings on H.R. 6855 Before the House Committee on Banking and Currency*, 68th Cong. 1st Sess. 8 (1924) (testimony of Comptroller Dawes).

10 66 Cong. Rec. 1585-86 (1925) (statement of Rep. McFadden). *See also* 67 Cong. Rec. 2828 (1926) (investment securities business regarded as part of "an existing banking service or business") (statement of Rep. McFadden). In *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 215 (1984) this Court noted: "Banks have long arranged the purchase and sale of securities as an accommodation to their customers. Congress expressly endorsed this *traditional banking service* in 1933." (Emphasis supplied.)

11 The distinction between the business of banking and the business of buying and selling securities petitioners now urge (Fed. P. at 32; Sec. Pac. at 24-27) would have been easy enough to accomplish if Congress had intended it. The section of the National Bank Act that Congress amended in 1927 to recognize the "business of buying and selling investment securities" had from its inception granted national banks "all such incidental powers as shall be necessary to carry on *the business of banking*" and listed specific activities in that respect. 12 U.S.C. § 24 (Seventh) (emphasis supplied). *See Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 158-59 n.11 (1984). Had Congress meant the locational restriction of Section 81 to reach only the "business of banking," it presumably would have amended the section to say just that. Instead, as noted, Congress broadened Section 81 to cover a national bank's "general business"—a phrase obviously broad enough to encompass the transaction of a bank's "business" in all its respects, including the then newly recognized securities business.

U.S. 137, 149 (1984) ("*SIA*") (quoting *Russello* v. *United States*, 464 U.S. 16, 21 (1983)). The ordinary meaning of "general" connotes an all-encompassing intent.[12] Accordingly, whatever its outer reaches may be, the phrase "the general business of a [national bank]" certainly encompasses *at least* those activities Congress has expressly sanctioned for such banks. And, the securities brokerage involved here has been held to constitute the "business of dealing in securities and stock" that is expressly authorized for national banks.[13]

12 *E.g.*, *Webster's Third International Dictionary* 944 (1966), defining "general" as "involving or belonging to the whole of a body, group, class or type: applicable or relevant to the whole rather than to a limited part, group, or section."

13 12 U.S.C. § 24 (Seventh). *See* 577 F. Supp. at 257, 20a; *aff'd*, 758 F.2d 739, 1a; *cert. denied*, 106 S. Ct. 790 (1986). As noted, the McFadden Act in 1927 authorized national banks to engage in the "business of buying and selling investment securities." Six years later, as part of the Glass-Steagall Act, Congress amended this language to all but eliminate that authority, permitting only a very restricted "business of dealing in investment securities." Banking Act of 1933 (Glass-Steagall Act), ch. 89, § 16, 48 Stat. 184. That language, in turn, was amended two years later to read, as it now does, the "business of dealing in securities and stock." Banking Act of 1935, ch. 614, § 303, 49 Stat. 707 (codified at 12 U.S.C. § 24 (Seventh)).

It is thus unnecessary to speculate what activities other than those enumerated in 12 U.S.C. § 24 (Seventh) may or may not also be included within "the general business" of a national bank. It may well be that certain support functions, such as data processing, that do not involve transacting business with the public may be carried on at non-branch locations. Indeed, the courts below expressly based their holding on the undeniable fact that the provision of brokerage services here "is clearly aimed at attracting and servicing customers conveniently" (577 F. Supp. at 260, 28a)—thus applying a factor this and other courts uniformly have regarded as relevant in deciding branching questions. *E.g.*, *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 136-37 (1969) ("*Plant City*") (armored car service); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 943 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("*IBAA*") (customer-bank communication terminals); *St. Louis County National Bank* v. *Mercantile Trust Co. National Association*, 548 F.2d 716, 719 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) ("*Mercantile Trust*") (trust office). Contrary to petitioner's suggestion (Fed. P. at 27), the courts below simply did not address, nor will their opinions affect, the location of bank support activities that do not involve transactions with the public.

Petitioners attempt (Fed. P. at 31-34; Sec. Pac. at 24-26) to support a contrary conclusion from the locations of the securities activities of banks during 1920-30. This case, however, concerns the locational restrictions of the National Bank Act, and those restrictions generally apply only to banks themselves, not to banks' non-subsidiary affiliates.[14] The securities activities cited by petitioners (Fed. P. at 31; Sec. Pac. at 23-25), to the extent they involved banks organized under the National Bank Act, were conducted by *affiliates* and not by the banks themselves.[15] Whatever and wherever they may have been, those activities are simply immaterial to the issue here.[16]

Further, the affiliation between national banks and securities entities during the 1920s occurred almost without exception through means other than direct ownership.[17] This difference in corporate organization is significant, as the Comptroller has both pointed out in this case[18] and recognized by regulation.[19] The Comptroller made clear in permitting national banks to create directly-owned operating subsidiaries that "all provisions of Federal banking law applicable to the operations of the parent bank" are equally applicable to their subsidiaries—confirming that banks may not utilize subsidiaries to evade the limitations that apply to banks. 12 C.F.R. § 5.34(d)(2)(i) (1986).

Petitioners' effort to divine Congressional "acquiescence" in their position from Congress' consideration and enactment of the International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 *et seq.*, (Fed. P. at 37-38; Sec. Pac. at 31), is particularly anomalous. In enacting that statute, which regulated the activities of foreign banking entities for the first time, Congress was careful to make clear that its actions should *not* be construed as any precedent concerning locational restrictions on the activities of national banks. The House Report put it succinctly:

> Resolutions involving the more controversial issues—interstate branching . . . —should be viewed only as efforts to deal with specific situations related to the unique status or operations of foreign banks. There is no intent to use the legislation as a means for setting precedents or policies affecting the domestic banking system.[20]

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14 That is, of course, unless the affiliates are used to evade otherwise applicable locational restrictions. *E.g.*, *Jackson* v. *First National Bank of Gainsville*, 430 F.2d 1200 (5th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

15 *Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1055-57 (1931) (hereafter "*1931 Hearings*"); W. Peach, *The Securities Affiliates of National Banks* 51-52 (1941) (hereafter "*Peach*").

16 Petitioners' allusions to the supposed "interstate nature" of "national bank activities" in the 1920s (Sec. Pac. at 24-25) or the "interstate securities offices" operated by banks at that time (Fed. P. at 33), in the context of this case, border on the disingenuous.

17 *1931 Hearings* at 1056; *Peach* at 68. National banks (as distinct from some state chartered banks) were prohibited from owning stock. *Id.*

18 Comptroller's Petition for a Writ of Certiorari ("Compt. Pet.") at 10 n.10 ("while bank subsidiaries may be funded with bank funds, holding company subsidiaries may not"). For example, while the ability of a national bank to provide funds to its affiliates is statutorily restricted, 12 U.S.C. § 371c, Congress expressly excluded from that restriction any majority-owned subsidiary of a bank (12 U.S.C. § 371c(b)(2)(A)), because such a subsidiary "should be regarded as part of its parent bank." S. Rep. No. 536, 97th Cong., 2d Sess. 31 (1982).

19 *See* 12 C.F.R. § 5.34 (1986).

20 H.R. Rep. No. 910, 95th Cong., 2d Sess. 8 (1978). Congressional action four years later underscores the absence of any supposed "acquiescence" in petitioners' current position. In 1982, Congress amended the Bank Service Corporation Act to authorize bank service corporations to engage in so-called "non-banking" activities to the extent permitted by the Federal Reserve Board for bank holding companies under the statute governing those entities. Bank Service Corporation Act, Pub. L. No. 97-320, tit. VII, § 409, 96 Stat. 1542 (1982) (codified at 12 U.S.C. § 1864(f)). Discount securities brokerage is included among those activities. 12 C.F.R. § 225.25(b)(15) (1986). In so doing, however, Congress expressly confirmed that "the provisions

In sum, the unambiguous language of Section 81 specifies that banks may conduct their business only at their headquarters and at permitted branches. Securities brokerage authorized as a part of that business is equally subject to the governing geographic restrictions. The decision below should be affirmed for this reason alone.

B. The Comptroller's Ruling also Contravened the Branching Provision Applicable to a National Bank's Business

Given the dispositive impact of Section 81, examination of the branching provision applicable to national banks, 12 U.S.C. § 36, is unnecessary. Review of the Comptroller's ruling concerning that provision, however, shows that the courts below correctly found it contrary to law.

First, the Comptroller's ruling approached Section 36 as if it were suspended in a statutory vacuum. Section 36(f) defines a "branch" as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f). Focusing exclusively on that section, the Comptroller concluded that its definition is limited to the three functions expressly set forth (taking deposits, cashing checks and lending money). Because securities brokerage is not one of those functions, the Comptroller reasoned, banks are free to transact that business at any site. (44a.) This analysis, however, ignores that Section 36 does not stand alone. It was enacted as, and remains, an *exception* to the overall restriction of Section 81, which otherwise limits a national bank's general business to one office. (*See* Point I.A, *supra*.)

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of Federal and State branching law regulating the geographic location of banks to the extent that those laws are applicable" will still govern any activity so authorized for a bank service corporation. 12 U.S.C. § 1864(f). If Congress had understood, as petitioners now argue, that the locational restrictions of the National Bank Act have no application at all to so-called "non-banking" activities of bank subsidiaries, the quoted language obviously would not have been included in the statute.

Taking this statutory structure into account, the Comptroller's reasoning actually leads to the opposite result. If, as the Comptroller ruled, a "branch" would exist *only* where one of the three enumerated functions is performed, it follows that a "branch" could not exist *unless* one of those functions were performed there. All other activities, including securities brokerage, would remain subject to the overall restriction in Section 81. Accordingly, ex "branch," those activities could be located only at a bank's main office—not, as the Comptroller concluded, at any location whether licensed or unlicensed, intrastate or interstate.

Second, the Comptroller's branching analysis is directly contrary to the legislative history of the McFadden Act. The present language of Section 81 derives from a Senate amendment to the McFadden bill initially passed by the House. The House bill had permitted banks to establish "branches," which were defined (as now) to "include" any place where "deposits are received or checks cashed or money loaned." H.R. 2, 69th Congress, 1st Sess., § 8 (1925). The bill also provided that "the general business of each [national bank] shall be transacted in the place specified in its organization certificate" (*id.*) but did not state that a bank's general business could also be transacted at branches. The Senate, however, left no doubt in this regard. It amended the House language to read (as it does now): "The general business of each [national bank] shall be transacted in the place specified in its organization certificate *and* in the branch or branches, if any, established or maintained by it. . . ." S. Rep. No. 473, 69th Cong., 1st Sess. 4 (1926) (emphasis supplied).

The subsequent Conference Report accompanying the McFadden Act highlighted the significance of the Senate amendment. As the Statement of the House Managers, including Representative McFadden, put it:

> The Senate amendment provides that national banks might transact general business *not only* at the place specified in the organization certificate *but also* at such branches as the bank might lawfully maintain under the provisions of the bill. The House bill contained no similar provision, and the House recedes with an amendment making clerical changes.

H.R. Rep. No. 1481, 69th Cong., 1st Sess. 4-5 (1926) (emphasis supplied). Congress thus understood a branch to encompass not only the three functions specifically enumerated in the House-drafted definition of that term but also "general business" transacted at banks' headquarters. Representative McFadden's own analysis of the Act, placed in the Congressional Record shortly after it was passed, underscored the point. He said:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office*, is a branch if it is legally established under the provisions of this act.

68 Cong. Rec. 5816 (1927) (emphasis supplied).[21] In short, as the courts below found, the Comptroller's restrictive definition of "branch" flies right in the face of congressional intent.

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21 This Court, the courts below and every Court of Appeals to have considered it have found this statement highly significant. *See Plant City*, 396 U.S. at 134 n.8; 577 F. Supp. at 259, 26a; *IBAA*, 534 F.2d at 931; *Mercantile Trust*, 548 F.2d at 719; *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 179 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) ("*Fort Collins*"). In light of this precedent, petitioners' effort to deride this legislative history as "post enactment" (Compt. Pet. at 13 n.12; Sec. Pac. Pet. at 16) is, at best, unpersuasive.

Moreover, as petitioners note (Fed. P. at 20, n.11), Congress amended the branching provisions in 1933 to permit state-wide branching as well as the city-wide branching that originally had been authorized in 1927. *See* Banking Act of 1933 (Glass-Steagall Act), ch. 89, § 23, 48 Stat. 189 (codified at 12 U.S.C. § 36(c)). It did so with full knowledge of Representative McFadden's analysis, yet Congress made no change at all either in the language of the overall geographic restriction in Section 81 or in the definition of "branch" in Section 36(f).

Third, the Comptroller's ruling contravenes the holdings of every appellate court to have addressed the issue. This Court addressed the branching provision in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) ("*Plant City*"). It stated:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

Id. at 135 (footnote omitted, emphasis in original). The Court there rejected the Comptroller's attempt to read the definition of "branch" narrowly and held that an armored car messenger service operated by a national bank was a "branch" of that bank under Section 36.

Following a similarly flexible approach, Courts of Appeals also uniformly have refused attempts by the Comptroller, either as a party or as an *amicus*, to restrict the reach of the branching provisions. The Eighth Circuit in *St. Louis County National Bank* v. *Mercantile Trust Co. National Bank*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) ("*Mercantile Trust*"), for example, specifically declined to accept the Comptroller's argument, advanced once again here, that the term "branch" includes only the three functions specifically enumerated in Section 36(f). The Court held that "the three routine banking functions delineated in Section 36(f) are *not* the only indicia of branch banking," and struck down the Comptroller's effort to sanction a bank's trust office opened at a non-branch location. *Id.* at 719 (emphasis supplied). The Courts of Appeals for the Tenth, Seventh and

District of Columbia Circuits have articulated a similar approach in other cases.[22]

The Comptroller nevertheless attempts to portray the *Mercantile Trust* decision as novel. (Fed. P. at 40 n.26.) Actually, it is the Comptroller who, by suggesting that Section 36(f) be limited only to bank activities involving "dealings with the public requiring a specialized banking or similar license," has urged an unprecedented interpretation. (43a-44a; *see* Fed. P. at 40.) The Comptroller offers no support for this whole-cloth suggestion. Nor could he, in that two of the three functions enumerated in Section 36(f) itself—lending money and paying checks—require no national banking charter or other specialized license and are carried on by any number of entities. Congress plainly intended no such restriction of the statutory definition.

Finally, contrary to petitioners' suggestion (Fed. P. at 36; Sec. Pac. at 31), the decisions below do not set any precedent concerning what *level* of bank activities may be permissible at

22 *Fort Collins*, 540 F.2d at 499 ("accepting deposits, or paying checks, or lending money are *not* the only indicia of branch banking. The typical bank of the present time provides many other services.") (emphasis supplied); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *IBAA*, 534 F.2d at 932.

The extent to which petitioners reach to find *any* authority to support their position is, itself, telling: their sole authority is *Continental Illinois National Bank & Trust Co.* v. *Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976) (Fed. P. at 28-29; Sec. Pac. at 18 n.11), an unpublished memorandum opinion of a district court filed one month *prior* to the directly contrary ruling in *Mercantile Trust*. Petitioners nevertheless cite *Lignoul* to suggest that the word "include" in Section 36(f) relates to the places where a bank may transact business rather than the nature of those activities. (Fed. P. at 28-29; Sec. Pac. at 18 n.11). But, as the Court confirmed in *Plant City*, Section 36(f) covers "*any* place," 396 U.S. at 135 (emphasis in original), at which the three enumerated functions are performed and "may include more" (*id.*). It would be patently illogical to conclude that Section 36(f) was intended to "include" more *places* than are already included in the phrase "*any* place", which of course includes every place. The word "include" obviously relates instead to the *functions* listed in the section.

remote locations. Here, concededly, the brokerage facilities would involve the full panoply of discount brokerage services for the public and as such are unquestionably subject to the locational restrictions on the business of national banks.[23]

In sum, logic, legislative history and legal precedent all confirm that the Comptroller's branching ruling was contrary to law. For this reason, too, his ruling was properly voided by the courts below.

C. No Deference is Due the Comptroller's Ruling

Given the Comptroller's failure to mention, let alone consider, the import of Section 81 in his analysis of Section 36, petitioners' suggestion of "deference" to his ruling rings hollow. (Fed. P. at 37, 41; Sec. Pac. at 31-32.) Where "the Comptroller adopted no expressly articulated position at the administrative level," subsequent rationalizations of his action by appellate counsel are "hardly tantamount to an administrative interpretation." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-28 (1971). And, as the Court recently confirmed, such "*post hoc* rationalizations by counsel for agency action are entitled to little deference." *SIA*, 468 U.S. at 143.

23 The SIA has never contended, nor did the courts below decide, that banks may not employ agents who must act elsewhere to perform functions in support of services offered at chartered locations, which is all that was involved in *Merchants Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604 (1871), cited by petitioners. (Fed. P. at 30-31, 42; Sec. Pac. at 23.) That issue concerns the *level* of activities permissible for remote locations and not the *type* of permitted activities. *See Plant City*, 396 U.S. at 137 n.10.

The Comptroller's reference (Fed. P. at 36) to activities such as loan production offices in non-branch locations also is unavailing. The legality of those offices, of course, is not at issue here and may depend upon different facts. See *Independent Bankers Ass'n of America* v. *Heimann*, 627 F.2d 486, 48 n.** (D.C. Cir. 1980), in which the court noted that when bank loan production offices exceeded a certain level of activity in providing services to customers, those offices would be subject to the Act's restrictions. In any event, references to other activities cannot be bootstrapped into legalizing the interstate location of bank offices for brokerage services.

Further, the Comptroller's ruling involved "the quintessential judicial function of deciding what a statute means."[24] The courts have the "ultimate responsibility to construe the language employed by Congress,"[25] and deference, as the Court has said, "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."[26] This teaching has particular application in the circumstances here, in that Congress, by statute, has expressly *withheld* any authority for the Comptroller to issue regulations under Section 36.[27]

Discussion of judicial deference to an administrative agency is actually "pointless" where the agency action "violate[s] the plain language of the Act, as well as the statutory purposes revealed by the legislative history." *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981). As the Court put it in voiding a similarly unprecedented action by another bank regulator:

> A reviewing court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."

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24 *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 98 n.8 (1983). *See also Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). The Administrative Procedure Act, of course, directs that agency action is to be set aside by the courts wherever it is found to be "not in accordance with law". 5 U.S.C. § 706(2)(A).

25 *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *see NLRB* v. *Brown*, 380 U.S. 278, 291-92 (1965).

26 *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, 464 U.S. at 97 (quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965)).

27 Depository Institutions Deregulation and Monetary Control Act of 1980, § 708, 94 Stat. 188 (codified at 12 U.S.C. § 93a). *See SIA*, 468 U.S. at 154 (rulemaking authority also withheld as to substantive restrictions on bank securities activities).

SIA, 468 U.S. at 143 (citations omitted). So here. As shown, the ruling in this case not only ignored the mandate of Section 81 but also contravened the intent of Section 36. In short, the Comptroller's ruling that permitted expanded bank locations in this case, as in numerous earlier cases,[28] is entitled to little, if any, deference. The decision below should be affirmed.

II

THE SIA HAS STANDING UNDER THE NATIONAL BANK ACT TO CHALLENGE THE COMPTROLLER'S RULING

Article III of the Constitution, of course, limits federal courts to adjudicating actual "cases" and "controversies." *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *Flast* v. *Cohen*, 392 U.S. 83 (1968). To satisfy Article III requirements, a litigant must have "standing" to invoke the power of a federal court. *See, e.g., Allen* v. *Wright*, 468 U.S. 737, 750 (1984); *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). That standing arises where a litigant "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"[29] and "the injury 'is likely to be redressed by a favorable decision.' "[30]

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28 Indeed, if the Court had deferred as urged now to the Comptroller's previous interpretations of the statutory restrictions on bank locations, both *Plant City*, 396 U.S. 122 (1969), and *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), would have yielded different results. The court below similarly rejected the Comptroller's efforts to relax the geographic constraints on banks in *IBAA*, 534 F.2d 921 as did the Eighth Circuit in *Mercantile Trust*, 548 F.2d 716 and the Tenth Circuit in *Fort Collins*, 540 F.2d 497.

29 *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)).

30 *Heckler* v. *Mathews*, 465 U.S. at 738 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)).

Here, no question exists as to the SIA's constitutional standing. Petitioners long ago abandoned any contention (22a) that members of the SIA would not suffer competitive "injury in fact" from the Comptroller's action, which plainly they would (23a), and that injury clearly would be redressed by a favorable decision. In short, as petitioners concede, "there obviously is adequate adversity of interest in this case to satisfy the requirements of Article III of the Constitution." (Compt. Pet. at 24 n.19; *see* Sec. Pac. Pet. at 19.) That said, any issue as to the SIA's standing should be all but obviated. For, while the Court has articulated extra-constitutional, "prudential" concerns relating to standing, the Court has also made clear that when, as in this case, a litigant has standing under Article III those concerns are generally resolved:

> Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requirements are met.

Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978).[31]

Petitioners nevertheless seek to slam the courthouse door on the SIA through use of one of the prudential doctrines—the "zone of interests" rationale. Petitioners' ironic reliance on this "limitation" (*e.g.*, Fed. P. at 16) is misplaced. Originally developed in the context of challenges under the Administrative Procedure Act, 5 U.S.C. § 702, to rulings by the Comp-

31 *Accord Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-64 (1977). *See* L. Tribe, *American Constitutional Law* 10-15 (Supp. 1979). *Cf. Barlow* v. *Collins*, 397 U.S. 159, 172 (1970) (Brennan, J., concurring in the result and dissenting)("Standing exists when the plaintiff alleges . . . that the challenged action has caused him injury in fact, economic or otherwise."). The various prudential concerns apply only in "appropriate circumstances." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979). *See also Warth* v. *Seldin*, 422 U.S. at 499.

troller, the zone of interests rationale was actually designed to "*enlarge*[ ] . . . the class of people who may protest administrative action." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970) ("*Data Processing*") (emphasis supplied). It requires simply that "the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153 (emphasis supplied). And, it is satisfied when "Congress had arguably legislated against the *competition* that the petitioners sought to challenge, and from which flowed their injury." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620 (1971) (emphasis supplied).[32] It is not necessary under the rationale to "rely on any legislative history showing that Congress desired to protect" specific competitors, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970), or to show that "Congress had indeed prohibited [the competition at issue]." *Investment Co. Institute*, 401 U.S. at 620.[33]

The Court repeatedly has applied this rationale to uphold the standing of non-bank competitors to challenge the Comp-

32 As one commentator has said, to satisfy the zone rationale, a litigant need not be regulated by the statute but need only show that it is "significantly involved in activities affected by those who are regulated." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3531.7 at 512 n.16 (1984). *See also* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 Mich. L. Rev. 1445, 1479 (1971).

33 The zone of interests rationale, when first articulated, contradistinguished the earlier "legal interest" test. *Data Processing*, 397 U.S. at 153. Except as a logical counterpoint to that earlier, restrictive test, it is questionable whether a separate zone of interests rationale would be needed under the Administrative Procedure Act, in that the statute expressly specifies standing for any party "adversely affected or aggrieved" by agency action. 5 U.S.C. § 702. *See* 4 K. Davis, *Administrative Law Treatise* § 24:17 (2d ed. 1983); *cf. Synar* v. *United States*, 626 F. Supp. 1374 (D.D.C. 1986) (Scalia, Johnson, Gasch, JJ.) (dispensing with zone of interests test where the statute at issue provided that "any. . . person *adversely affected* by any action under this title, may bring an action. . . .") (emphasis supplied), *aff'd sub nom. Bowsher* v. *Synar*, No. 85-1377 (U.S. July 7, 1986).

troller's rulings permitting expanded bank activities under the National Bank Act:

> — In *Data Processing*, companies offering data processing services to the general business community had standing, under the zone rationale, to challenge the Comptroller's ruling pursuant to the National Bank Act that national banks could make data processing services available to other banks and to bank customers—in competition with the data processing companies. 397 U.S. at 157.
>
> — In *Arnold Tours*, travel agents serving the general public had standing, under the zone rationale, to challenge the Comptroller's ruling pursuant to the National Bank Act that national banks could provide travel services for their customers—in competition with the travel agents. 400 U.S. at 46.
>
> — In *Investment Co. Institute*, open-end investment companies had standing, under the zone rationale, to challenge the Comptroller's ruling pursuant to the National Bank Act that national banks could establish and operate collective investment funds—in competition with the investment companies. 401 U.S. at 620.[34]

Petitioners in effect seek to have the Court reverse the rationale of each of these cases. Here, too, the complainants would suffer competitive harm from the Comptroller's narrow interpretation of a National Bank Act restriction. The only "difference" is that the restriction at issue in this case applies to the location rather than the substance of bank activities—a

34 Petitioners stretch to distinguish *Data Processing* and *Arnold Tours* by claiming that supposedly "no other party would have been entitled to bring suit" in those cases, whereas here state banks could bring suit. (Fed. P. at 24.) State banks, however, would also have suffered competitive injury as a result of competition from national banks providing travel services and data processing activities. Under petitioners' rationale, therefore, state banks would equally have had standing to challenge the Comptroller's rulings in each of those cases.

"difference" with no meaningful legal distinction. The geographic restrictions of Section 81 are but one reflection of the congressional determination, evident throughout the National Bank Act, to restrict the scope of national banks' activities in light of the unique nature and economic power of those institutions in our country.[35]

It is undisputed that the SIA has standing in this case to challenge the types of activities permissible for national banks. (*See* Compt. Pet. at 19-20; Sec. Pac. Pet. at 18-19.) It is incongruous to argue that, although the Comptroller's interpretation of the statutory provisions restricting the substance of bank activities may be challenged, his interpretation of the provisions restricting the location of those same activities may not. Both restrictions obviously were intended to limit the reach of competition by national banks, the effect of which was to benefit bank competitors, whoever they may be. And, interpretations of both those restrictions give rise to competitive injury against which Congress—at the very least "arguably"—legislated. As the courts below recognized (577 F. Supp. at 258-59, 24a):

35 *See IBAA*, 535 F.2d at 936 (purpose of National Bank act was to circumvent the ability of "big banks," with their great economic resources, from further extending their financial dominance over commerce through geographic expansion and thereby "less[ening] competition in the financial sector."); *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) (recognizing congressional policy opposing "economic concentration and conflicts of interest which underlie the statutory separation of commerce and banking"). The legislative history to the Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (codified as amended at 12 U.S.C. § 1341 *et seq.*), confirms this underlying policy of federal banking law. *See, e.g.*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2, 6 (1955) (geographic restrictions on bank activities prevent "concentration in all lines, cartels, the stifling of new enterprises, and stagnation. . . ."); 101 Cong. Rec. 8030-31 (1955) (critizing "unfair competition of giant interstate combines fortified with the income, resources and power flowing from vast nonbanking activities") (statement of Rep. Rains); 101 Cong. Rec. 8184 (1955) (statement of Rep. Wier).

> [T]he branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities. To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

Petitioners' standing analysis, as does their argument on the merits, simply misses the argumentative boat. Again, they dwell solely on the branching language in Section 36 of the McFadden Act. They argue that it was intended to protect the competitive interests of state banks alone and therefore can provide no standing to the SIA. (Fed. P. at 19-21; Sec Pac. at 36.) And, again, they fail to consider that Section 36 was an *exception* to the broad prohibition of Section 81 in the National Bank Act, which is equally involved.[36] (*See* Point I, *supra*.)

Sections 36 and 81, as integrally related restrictions on national banks, should be considered together in defining a

36 The analysis of the dissent below similarly considered only Section 36 and avoided the overall restriction and policy of Section 81. The dissent reasoned that Section 36 intended to protect only state banks and, by an analogy that underscores the importance of the dissent's logical lapse, suggested the SIA had no more standing than businesses competing for "parking spaces" occupied by a branch. (6a.) The competitive benefit flowing from the basic geographic restriction in Section 81, however, accrues to all competitors in lines of business in which national banks *compete*. National banks compete for brokerage customers; they do not compete for parking customers.

litigant's standing to challenge an interpretation under them.[37] Petitioners' analysis focuses only on the branching exception and ignores the basic locational rule. By arguing only about what Congress intended in *relaxing* the geographic restriction on national bank activities in 1927 and again in 1933, petitioners attempt to avoid the continuing Congressional objective that led to the enactment of the basic restriction in the first place.

Although neither the legislative history nor the terms of Section 81 itself may single out a specific group of competitors, its "general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the [Section] are easily identifiable." *Data Processing*, 397 U.S. at 157. Plainly, the competitive interests of SIA members are "directly affected" by the Comptroller's contravention of the "general policy" underlying Section 81. The SIA's standing to challenge the Comptroller's ruling should be affirmed.

CONCLUSION

Petitioners have contended successfully that the permissible business of national banks includes discount securities brokerage. Yet petitioners now contend that such brokerage should not be subject to the same restrictions as apply to the rest of that business. Petitioners cannot have it both ways. As a statutorily authorized part of the business of banks, discount brokerage activities are subject to the same geographic restrictions as apply to all other functions undertaken by banks. The

37 In applying the zone of interests test, courts may rely upon related provisions of the same statute, or even different statutes that share a common purpose. *E.g.*, *Autolog Corp.* v. *Regan*, 731 F.2d 25, 30-31 & 30 n.3 (D.C. Cir. 1984); *California Cartage Co.* v. *United States*, 721 F.2d 1199, 1203-06 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 110 (1984); *Taylor* v. *Jones*, 653 F.2d 1193, 1207-08 (8th Cir. 1981).

judgment of the Court of Appeals in this respect should be affirmed.

Dated: July 22, 1986

Respectfully submitted,

JAMES B. WEIDNER
Counsel of Record
DAVID A. SCHULZ
MARK HOLLAND
PETER KIMM, JR.
NANCY A. BROWN
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8235

Attorneys for Respondent

Of Counsel:

WILLIAM J. FITZPATRICK
Senior Vice President and
General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271
(212) 608-1500

DONALD J. CRAWFORD
Senior Vice President and
Director of Government Relations
Securities Industry Association
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 296-9410

STATUTORY APPENDIX

The fundamental geographic restriction of the National Bank Act, 12 U.S.C. § 81, provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with [12 U.S.C. § 36].

The "branching" provisions are set forth in 12 U.S.C. § 36, which provides in relevant part:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> * * *
>
> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> * * *
>
> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(14) (15)

Nos. 85-971 and 85-972

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

SECURITY PACIFIC NATIONAL BANK, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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REPLY BRIEF FOR THE FEDERAL PETITIONER

The centerpiece of respondent's argument is the novel proposition that 12 U.S.C. 36—which contains the McFadden Act's definition of the term "branch"—is wholly irrelevant to the question whether a given bank office in fact is a branch that is subject to the Act's geographical restrictions. Instead, respondent asserts, that question is answered by 12 U.S.C. 81, which provides that "[t]he general business of each national banking association shall be transacted" in the bank's home office and "in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title." Respondent reads this provision to require that national banks perform essentially *all* of their business at their home offices or at branches: "national banks may locate their business only at their headquarters or licensed

branches within the same state" (Br. 11; see *id.* at 12). For a number of reasons, this argument is fundamentally flawed.

1. a. Section 36(c) restricts the locations at which national banks may establish "branches." Section 36(f) in turn defines the term branch for purposes of the Section 36(c) restrictions. In full, Section 36(f) reads (emphasis added): "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia *at which deposits are received, or checks paid, or money lent.*" As we explained in our opening brief (at 28-29), this provision provides on its face that a bank office is a branch only if it receives deposits, pays checks, or lends money. And this is the most sensible, as well as the only natural, reading of the statute. If the functions enumerated in Section 36(f) are only illustrative, the provision becomes unnecessary. It is hardly likely that Congress intended a definitional provision to be so nebulous—particularly when, as we have explained (Gov't Br. 30 n.18), the language of Section 36(f) was written as a response to a particular set of problems involving bank offices performing the enumerated functions.

Respondent's reading of Section 81 (12 U.S.C. 81), however, would render the carefully written language of Section 36(f) entirely nugatory. In respondent's view, Section 81 requires that *all* bank business be performed only at the main office or at a licensed branch; under this approach, any office that performs essentially *any* bank business is subject to the Act's geographical restrictions on the establishment of branches.[1] But if Section 81 has such

[1] Evidently recognizing that its broad assertions about the meaning of Section 81 cannot be reconciled with judicial authority and with longstanding practice in the banking industry, respondent subsequently acknowledges several exceptions to its reading of the provision: it acknowledges (Br. 15 n.13) that support functions not involving dealings with the public may be performed away from a bank's main office or branches, and (Br. 22-23 & n.23) that bank agents likewise may perform certain functions at nonbranch locations. As we explain below, these exceptions—which, as formulated by respondent in response to adverse precedent, find no basis in the language or purposes of the McFadden Act—are far too niggardly.

a broad meaning, there would be no role in the statutory scheme for a separate definition of branch—let alone for the definition in Section 36(f), which explicitly limits branch offices to those performing a limited number of specifically enumerated functions. As a general matter, of course, a reading that would thus render a portion of a statute superfluous should be avoided. See *Exxon Corp.* v. *Hunt,* No. 84-978 (Mar. 10, 1986), slip op. 14; *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana,* No. 84-262 (June 10, 1985), slip op. 11. And that canon of construction has particular force here, where Section 81 was amended at the time of the passage of the McFadden Act to include an express reference to Section 36.

The implausibility of respondent's reading of Section 81 is confirmed by its novelty. While respondent insists that Section 81 establishes the "fundamental restriction" (Br. 5, 11) on the location of bank offices, so far as we are aware no court, in the 59 years that Section 36 has been in force, has looked to Section 81 in resolving a McFadden Act challenge to the location of bank offices. Instead, all of the many branching cases—including this Court's decision in *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969), upon which respondent itself relies (Br. 21)—have focused exclusively on the definition of the term "branch" contained in Section 36(f) in resolving such challenges, looking to whether the bank office involved performed one of the functions enumerated in that provi-

sion. See, *e.g.*, *Plant City*, 396 U.S. at 135-137; *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 933, 938-948 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976); *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 498-499 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 178 (7th Cir.), cert. denied, 429 U.S. 871 (1976). Under respondent's approach, all of these courts engaged in an unnecessary (and indeed improper) analysis.[2]

b. Respondent's approach is flawed even when Section 81 is viewed in isolation. Section 81 never has been understood to require that *all* bank business be performed at the bank's branch (or main) offices. To the contrary, shortly after its enactment, the Court flatly rejected the argument that Section 81 restricts all banking activities to a bank's main office; the Court held that a national bank could certify a check away from its main office, reasoning that "[t]he business of every bank, away from its office * * * is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents." *Merchants' Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604, 651 (1870).[3] The Court reached a similar conclusion some

[2] Because no court ever has relied on Section 81 in finding the establishment of a bank office improper—and because the provision in fact is demonstrably irrelevant to the issue here—respondent is incorrect in attributing significance to the Comptroller's failure to mention Section 81 in his opinion (Br. 23-24). See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 50 n.22 (1981).

[3] Respondent attempts (Br. 23 n.23) to distinguish *Merchants' Bank* by reasoning that it involved the activity of an agent whose actions facilitated the provision of services at chartered locations. However narrowly its holding is characterized, however, *Merchants' Bank* must stand for the proposition that certain bank business may be performed away from the home office. And if bank agents may perform essential banking services away from the bank's main office, it is difficult to imagine why Congress would have wanted Section 81 to interfere with the activities of agents who are performing *nonbanking* activities.

50 years later when it endorsed the Attorney General's "well considered opinion" in *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87 (1911), which construed Section 81 to recognize "a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." See *First National Bank* v. *Missouri*, 263 U.S. 640, 658 (1924).

Indeed, despite respondent's assertion to the contrary, Section 81 does not state that all bank business must be conducted at a branch or the home office.[4] Instead, it provides that the "general business of each national bank[]" is so confined. And that phrase has long been understood to reach only those activities that make up the "general banking business." The Attorney General's authoritative opinion in *Lowry National Bank* repeatedly uses the two phrases interchangeably. See 29 Op. Att'y Gen. at 85, 86, 87, 93 (construing Section 81 to include "the general banking business of a national bank").[5]

While the Act does not define the phrases "general business of each national bank[]" or "general banking business," they plainly refer to those activities that are

[4] The legislative history confirms the congressional understanding that Section 81 did not confine all bank activities to the home office: when the provision was enacted in 1864 as part of the National Bank Act, Congress recognized that banks might perform certain activities on an interstate basis. See Cong. Globe, 38th Cong., 1st Sess. 1379, 1381 (1864) (acknowledging that banks from around the country would redeem their notes in New York City); see also *id.* at 2145. See generally Note, *Interstate Banking Restrictions Under the McFadden Act*, 72 U. Va. L. Rev. 1121, 1127 (1986).

[5] Respondent's attempt (Br. 13, 14 & n.11) to find significance in Congress's 1927 modification of Section 81, which changed the statute's reference from the "usual business of each national bank[]" to the "general business," is without merit. Well before the 1927 amendment, the two phrases were used interchangeably; the amendment simply codified the accepted notion that the "usual business" of a bank was the "general banking business." See *Lowry National Bank*, 29 Op. Att'y Gen. at 85, 91.

essential attributes of a bank's role as a provider of depository and related banking services.[6] The Court has long recognized, for example, that "the business of banking consist[s] [of] receiving deposits, * * * discount[ing] bills and notes and * * * loan[ing] money." *Oulton* v. *Savings Institution*, 84 U.S. (17 Wall.) 109, 118 (1872). See also *Melton* v. *Unterreiner*, 575 F.2d 204, 207 n.4 (8th Cir. 1978); *Leuthold* v. *Camp*, 273 F. Supp. 695, 700 (D. Mont. 1967), aff'd, 405 F.2d 499 (9th Cir. 1969). As we explain in our opening brief (at 40-41), discount securities brokerage plainly does not fall into this class of activities.[7] And while banks are authorized to offer discount brokerage by 12 U.S.C. (Supp.II) 24 Seventh, as respondent notes (Br. 13-14), that in itself hardly makes the purchase and sale of securities a part of the general banking business. To the contrary, Congress in Section 24 Seventh expressly distinguished the "business of banking" from the "business of dealing in securities and stock." In any event,

[6] As the Attorney General explained in *Lowry National Bank*, a bank office that carries on a "general banking business" is, as the language suggests, one that "competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution" (29 Op. Att'y Gen. at 88). Because, as we explain below, discount brokerage is not an aspect of the banking business at all, there is no need in this case for the Court to determine the precise contours of such a "general banking business." At a minimum, however, an office conducting such a business must—by taking deposits, making loans, and offering related services—provide a range of those services that attract customers to traditional banking institutions. See Note, *Interstate Banking Restrictions Under the McFadden Act*, 72 U. Va. L. Rev. 1121, 1128 (1986).

[7] Respondent relies (Br. 14 n.10) on *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207 (1984), in its argument that securities brokerage is an aspect of the business of banking. In fact, the Court there upheld the acquisition of a discount brokerage operation by a bank holding company on the theory that securities brokerage services are *nonbanking activities* that are closely related to banking. See *id.* at 210-211, 214-216.

banks may undertake any number of activities—those involving travel and data processing, the sale of bullion, medals and tokens, the distribution of travelers' checks, and the like—that are functionally unrelated to banking; an office that offers only one of these services plainly is not engaged in a "general banking business."

2. a. Because it devotes most of its attention to Section 81, respondent makes only a halfhearted argument (Br. 20-23) that discount brokerage offices are branches within the meaning of Section 36(f). In doing so, it relies primarily on a statement by Rep. McFadden (Br. 20) and on this Court's decision in *Plant City*. As we explained in our opening brief (at 33-34 n.23), however, Rep. McFadden's post-enactment statement, which reflected his hostility to liberalized branching, is not probative of congressional intent.[8] The *Plant City* decision, meanwhile, expressly declined to resolve the question whether branches may include bank offices other than those performing one of the three enumerated functions, and its analysis is entirely consistent with the Comptroller's position (see Gov't Br. 35-36).

Respondent also asserts that the Comptroller's reading of Section 36(f) is inconsistent with "the holdings of every appellate court to have addressed the issue" (Br. 21-22). This proposition is, again, substantially overstated. As we explained in our opening brief (at 40 n.26), while several courts have used broad language in describing the defini-

[8] Respondent suggests (Br. 20 n.21) that this Court has found Rep. McFadden's statement "highly significant." This assertion is substantially overstated. While the Court in *Plant City* cited the statement (396 U.S. at 134 n.8), it did not rely on the substance of Rep. McFadden's expanded definition of the term "branch." Instead, the Court cited his comment in the portion of its opinion holding that federal rather than state law is controlling in the determination whether a bank office is a branch. See *id.* at 130-134. In that respect, Rep. McFadden's comment was consistent with the language and legislative history of the Act.

tion of the term "branch," virtually all have grounded their holdings in branching cases on a finding that the bank office in question was in fact conducting one of the three functions enumerated in Section 36(f).[9]

b. Amicus Independent Bankers Association of America (IBAA) makes a different argument under Section 36(f). It suggests that the Comptroller's ruling will skuttle competitive equality between national and state banks. In the IBAA's view, national banks will obtain an edge over state-chartered institutions in the competition for banking customers if they are permitted to operate nonbanking offices, such as discount brokerage facilities, free from Section 36(c)'s branching restrictions (see Br. 16-17). Therefore, the IBAA concludes, such offices should be deemed branches.

The short answer to this assertion is that it is inconsistent with the language of the Act. The IBAA's argument concededly (IBAA Br. 14-15) turns on its contention that the three functions enumerated in Section 36(f) are not the exclusive hallmarks of a branch. That contention is fully answered above (at 2) and in our opening brief (at 27-38). Indeed, the language of Section 36(f) makes clear that Congress was not concerned with assuring that national and state banks would have identical authority in the *nonbanking* aspects of their operations.[10] Instead, the Act was intended to guarantee competitive equality in the provi-

[9] The only exception to this is the divided opinion of the Eighth Circuit in *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), cert. denied, 433 U.S. 909 (1977). As we explained in our opening brief (at 40 n.26), that decision was incorrect and is, in any event, distinguishable from the situation here.

[10] Similarly, nothing requires that the substantive powers granted national and state banks by the federal and state governments, respectively, must be identical—even though the grant of additional powers to one or another group of banks might well affect their ability to compete.

sion of the basic banking services enumerated in Section 36(f) (see Gov't Br. 29-33). Whether or not limitations on the operation of nonbanking offices of the sort urged by the IBAA are desirable, they are not imposed by the McFadden Act. See generally *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6-7, 12.

In any event, it is implausible to assert, as does the IBAA (Br. 14), that a national bank's ability to establish discount brokerage operations free from the Act's branching rules will provide national banks with an advantage in the competition for deposits and other banking business. It is true, of course, that a bank that offers a full range of services (including both traditional banking services and discount brokerage) at one location may have a competitive advantage over a bank that does not. Such a range of full-service banking and financial services, however, may be offered only at a bank's branches or main office. In contrast, a customer may not conduct his banking business at a nonbranch securities office. And it is hardly likely that the opportunity to obtain discount brokerage services at such a bank office will induce a customer to transfer his account to some other, inconvenient office of the same bank. It surely would be farfetched, for example, to suggest that a customer who uses discount brokerage services offered by Security Pacific at a New York City office will transfer his account from a New York bank to one of Security Pacific's California banking offices.[11]

[11] The harm postulated by the IBAA is entirely speculative for another reason as well: the IBAA fails to identify any state law that imposes locational restrictions on the operation of discount brokerage offices by state banks. Moreover, to the extent that the effect of national bank securities activities on competitive equality is relevant here, resolution of the case requires a well-developed record that can best be compiled when suit is brought by a state bank—a consideration that helps make clear respondent's lack of standing (see Gov't Br. 16, 21-22 n.12).

3. Respondent's arguments on standing simply fail to come to grips with the meaning of the zone of interests principle. Respondent suggests (Br. 26-27) that the zone of interests test was created to liberalize the standing requirements imposed by the earlier "legal interest" doctrine. Even if this is so, however, it hardly answers the question whether respondent's claim satisfies the requirements of the zone of interests test.

On the substance of the standing question, respondent essentially relies on three cases (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970); and *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971)) which held that bank competitors had standing to challenge bank activities under statutes other than the McFadden Act, as well as on respondent's conceded ability to challenge the activities of banks under the Glass-Steagall Act (12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378). Respondent draws from these cases the principle that all persons injured by the activities of their competitors have standing to challenge that activity in court—in other words, that, so long as Congress arguably has legislated against a given activity, anyone affected by that activity has standing to sue.

This approach would essentially read the zone of interests test out of the law by making competitive "injury in fact" sufficient to establish standing in every case. Yet both this Court and the lower courts repeatedly have indicated that the existence of standing—even when the plaintiff has been injured—turns on whether Congress "intended to protect" a given class of litigants. *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 7 n.7. See cases cited at Gov't Br. 17-18. As we explained in our opening brief (at 22-26), the cases upon which respondent relies are wholly consistent with this principle; they held only that, in the face of congressional *silence* about who is

to benefit from given legislative action, the zone test is satisfied when "Congress ha[s] arguably legislated against the competition that the [plaintiff seeks] to challenge." *Investment Co. Institute*, 401 U.S. at 620. See *Arnold Tours*, 400 U.S. at 46; *Data Processing Organizations*, 397 U.S. at 155-156. Determining whether a given litigant has standing therefore turns upon an examination of the language and legislative history of the statute at issue (see Gov't Br. 17-19).

When that examination is undertaken, it becomes clear that the distinction between the situation here and that in the cases cited by respondent is not, as respondent asserts, "only * * * that the restriction at issue in this case applies to the location rather than the substance of bank activities" (Br. 28). Instead, the crucial difference is that, as we demonstrated at length in our opening brief (at 19-21), Congress intended the Act's geographical restrictions to benefit only a *single* group of national bank competitors—a group to which respondent does not belong. Respondent offers no challenge to the overwhelming evidence of this congressional intent marshalled in our opening brief.[12] And because the Act was "intended only to protect" state banks, "there [is] no need to provide [respondent] with any remedy at all." *Pierce County*, slip op. 7 n.7.

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[12] Repondent again relies on Section 81 in arguing for standing (Br. 30-31), asserting that Congress intended that provision's restriction on bank activities to benefit all bank competitors. But Congress amended Section 81 at the time of the enactment of the McFadden Act in 1927 to make it conform—and to include an express reference—to Section 36. And as we explained in our opening brief, Congress explicitly indicated that the McFadden Act's geographical restrictions on the operation of national bank branches were imposed for the benefit of state banks. This history establishes that, in the congressional view, the entire set of restrictions on the activities of national banks were intended to benefit their state bank competitors.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40052

Nos. 85-971, 85-972

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

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v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,
v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

Of Counsel:

EDWARD J. MCANIFF
FREDERICK B. MCLANE
O'MELVENY & MYERS
400 S. Hope Street
Los Angeles, California 90071

RUSSELL A. FREEMAN
SECURITY PACIFIC
NATIONAL BANK
333 S. Hope Street (H54)
Los Angeles, California 90071

ARTHUR A. FRITZ
SPC SECURITIES SERVICES CORP.
333 S. Hope Street (H23-80)
Los Angeles, California 90071

WILLIAM T. COLEMAN, JR.
Counsel of Record
MARK WOOD
JOHN H. BEISNER
JACOB M. LEWIS
STUART A. STREICHLER
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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REPLY BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

To date, the central issue in this litigation has been whether petitioner Comptroller of the Currency ("Comptroller") acted lawfully in approving the establishment of national bank discount brokerage offices on an interstate basis, ruling that such offices are not branch banks under the McFadden Act, 12 U.S.C. § 36(f) (1982) (defining "branches" to be facilities "at which deposits are received, or checks paid, or money lent"), and that they thus are not subject to Section 36's provisions effectively limiting branches to a bank's home state. Now, in the

wake of petitioners' briefing on this issue, respondent Securities Industry Association ("SIA") shifts position, contending instead that regardless of whether the discount brokerage offices are branches, they violate another portion of the Act, 12 U.S.C. § 81, which SIA contends prohibits a national bank from conducting any business away from its main office or branches. This belated assault on the Comptroller's approval of petitioner Security Pacific National Bank's ("Security Pacific") discount brokerage offices is meritless.

I. THE COMPTROLLER CORRECTLY RULED THAT INTERSTATE DISCOUNT BROKERAGE OFFICES DO NOT VIOLATE THE McFADDEN ACT.

A. SIA's Unprecedented Reading Of Section 81 Is Indefensible.

SIA argues that because of Section 81, a national bank must "conduct [all of its] business only at [its] headquarters and at permitted branches." (SIA Br. at 18; *see also id.* at 14-15.) Thus, SIA promotes an unthinking analysis of whether a national bank may lawfully conduct a certain activity at a particular location. According to SIA, if an activity is conducted at a location other than the bank's main office or an authorized branch, it is improper. This position disregards the numerous prior judicial examinations of the McFadden Act, to say nothing of the Act's fundamental purpose and legislative history.

In previous McFadden Act challenges, it has always been conceded that the site of the challenged activity was neither the main office nor an authorized branch. Under SIA's reading of Section 81, the analysis should have ended there since any national bank activity conducted at a location other than a main office or authorized branch would be unlawful *per se*. Yet, in every prior case, the federal court perceived the dispositive issue to be whether the activities conducted at the challenged national bank facility were among the banking

functions enumerated in Section 36(f) (*i.e.*, receiving deposits, paying checks, or making loans), thereby making the facility a branch subject to the Act's locational restrictions. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) (question whether national bank could lawfully operate an armored car and a drop box turned on whether such facilities received deposits and therefore constituted branches). The underlying assumption was that if the national bank facility was not a branch under the McFadden Act, it could appropriately be located "anywhere (even across state lines)." *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 924 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).[1]

In making an argument inconsistent with these precedents, SIA errs by reading Section 81 in complete isolation, pretending that Section 36 does not exist. Indeed, if SIA is correct that Congress intended Section 81 to restrict all of a national bank's business to its main office or branches, there would have been no reason for defining "branch" in Section 36, since under SIA's view, every national bank office that is not a main office would have to be a branch.

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[1] *See also Jackson v. First Nat'l Bank of Gainesville*, 430 F.2d 1200 (5th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971) (same analysis as to armored car service); *St. Louis County Nat'l Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (similar analysis as to suburban trust offices); *Colorado ex rel. State Banking Board v. First Nat'l Bank of Fort Collins*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (similar analysis as to customer-bank communication terminals). In each of these cases, the analysis of whether the national bank operations at issue complied with the McFadden Act concentrated on Section 36 without attributing distinct significance to Section 81. SIA's erroneous allegation that the Comptroller gave inadequate consideration to Section 81 (SIA Br. at 23-25) is thus hardly a basis for denying deference to the Comptroller's ruling. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). (*See also* Sec. Pac. Br. at 19-32.)

Sections 36 and 81 (which were Sections 7 and 8, respectively, of the McFadden Act) are symbiotic provisions that must be read in tandem to give effect to their common purpose: to ensure a competitive balance between federal banks and state banks as to branch banking. (*See* Sec. Pac. Br. at 21.) According to the conference report on the McFadden Act, Section 81 merely establishes the permissive proposition that national banks "might transact" their banking activities "not only at the place specified in the organization certificate but also at . . . branches," and Section 36 in turn specifies those national bank facilities which, because of the activities they perform, are to be deemed "branches" subject to the locational limitations specified in that section. H.R. Rep. No. 1481, 69th Cong., 1st Sess. 4-5 (1926). *See also* S. Rep. No. 473, 69th Cong., 1st Sess. 8 (1926) (noting that Sections 81 and 36 together "deal with the all-important subject of branch banking"); H.R. Rep. No. 83, 69th Cong., 1st Sess. 4 (1926) (noting that Section 81 "recognizes the right of national banks to establish branches" in certain circumstances); 67 Cong. Rec. 3238 (1926) (statement of Rep. Black) (noting that Section 81 "is a permissive statute"). Although they erred in other respects, the lower courts herein at least recognized (like prior courts) that Sections 81 and 36 are to be construed together as creating "*branching* restrictions," *see* 577 F. Supp. at 260 (20a) (emphasis added), and that a court must first determine whether a national bank facility constitutes a branch bank (as defined by Section 36(f)) before deciding whether it is subject to the Act's "branching restrictions." *Id.*[2]

[2] The lower courts erred not in their framing of the issue presented, but rather in their application of an overbroad, untenable branch definition. (*See* Sec. Pac. Br. at 32-34.) The Comptroller has argued that this definition "would disrupt long settled practice in the banking industry." (Comp. Br. at 36.) The adoption of SIA's view of Section 81 would not only disrupt current practice but would also reverse the numerous banking law precedents noted previously. *See supra* at 2-3 & n.1.

Even if Section 81 could be read in isolation from Section 36, it would not yield the result advocated by SIA. Section 81 states:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

Contrary to SIA's argument (SIA Br. at 12, 14-15, 18), the "plain meaning" of the word "general" as used in Section 81 is hardly "all-encompassing," requiring that *all* business of a national bank be carried on at the "place specified in its organization certificate" or at authorized branches. If anything, Congress used "general" for a limiting purpose, intending to exclude some specific types of business.[3] Had Congress meant the provision to be "all-encompassing," it would have omitted the word "general" (to speak in terms of "*the* business of each national banking association") or simply used the word "all."[4]

[3] Another indication of a less than "all-encompassing" intent is Section 81's statement that "general business" may be carried on at "the place specified in [a national bank's] organization certificate." In 12 U.S.C. § 22 (1982), the "place specified in [the] organizational certificate" is defined as "[t]he place where [a national bank's] operations of discount and deposit are to be carried on," considerably less than the full range of authorized national bank functions.

[4] SIA relies heavily on its observation that Rev. Stat. 5190 stated that "[t]he *usual* business of [a] national banking association shall be transacted . . . in the place specified in its organization certificate" (emphasis added) and that the McFadden Act substitute the current Section 81 for that statute by, *inter alia*, inserting the phrase "general business" for "usual business." (*See* SIA Br. at 12-15.) SIA asserts that the inclusion of "general business" was specifically intended to prohibit a national bank from conducting any business away from its main office or authorized branches. Prior to passage of the McFadden Act, however, a na-

The McFadden Act's legislative history confirms that SIA is plainly wrong in asserting that Section 81 was intended to impose locational limitations on "*at least* those activities Congress has expressly sanctioned for [national] banks." (SIA Br. at 15 (emphasis in original).) Section 2(b) of the Act contained "two provisos, each of which recognize[d] and affirm[ed] the existence of a type of business which national banks [were then] conducting" in addition to the business of banking. S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926). The first proviso explicitly confirmed national bank authorization to engage in brokerage activities (of the type at issue herein) (*see* Sec. Pac. Br. at 22-25), and the other similarly affirmed national bank involvement in the "safe-deposit business." S. Rep. No. 473, at 7; H.R. Rep. No. 83, at 4. Section 2(b) of the bill Congress originally considered contained a phrase that would have expressly limited a national bank's authority "to conduct a safe deposit business" to activities "located on or adjacent to the premises of such association." 67 Cong. Rec. 3231 (1926). During final

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tional bank clearly was not required to conduct all of its business at its main office. (*See* Sec. Pac. Br. at 23 n.20.) For example, in one opinion, the Attorney General observed that as used in Rev. Stat. 5190,

> "usual business" . . . is to be construed [as] the general banking business usually conducted by national banks. There is no statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the [bank] . . . . [The bank] may not, however, establish a branch bank to do a general banking business such as is usually done by national banks.

34 Op. Att'y Gen. 1, 3-4 (1923). If the McFadden Act was intended to reverse the long-standing policy reflected in the Attorney General's opinion, one would expect at least some explicit mention of this purpose in the legislative history. Yet, no legislative history has come to light that would contradict the view that the phrase "general business" is simply another way of saying "usual business" and does not embrace "all the business of a national bank."

floor debates, however, the House deleted these locational restrictions. *Id.* at 3231-32. Upon introduction of the deleting amendment, Rep. Celler asked: "Does that mean that a safe-deposit business can be conducted a block away or a mile away from a national banking association?" *Id.* at 3232. Rep. McFadden responded in the affirmative, noting that the amendment "removes the limitations" on location. *Id.* Congress thus clearly did not intend any supposed locational restrictions in Section 81 to apply to the "expressly sanctioned" safe-deposit business.

Even more telling, before enactment, the bill never included any locational limitations with respect to the brokerage provisions in the same subsection. Congress knew that national bank brokerage activities were being conducted on a nationwide basis. (*See* Sec. Pac. Br. at 24-25; *see also infra* at 8.) Hence, the failure even to propose locational limitations on brokerage when such limits were proposed for the safe-deposit business is a strong signal that Congress had no desire to confine national bank brokerage to particular sites or to change the existing law and practice of allowing that business to be conducted nationwide. Moreover, it indicates that Section 81 does not provide any basis for nullifying the Comptroller's approval of interstate discount brokerage offices.

B. Section 36 Does Not Restrict Discount Brokerage Activities.

SIA alternatively contends that the Comptroller's ruling should be reversed because he erred in holding that interstate discount brokerage offices are not branches and that they therefore are not subject to the locational limitations of Section 36. (SIA Br. at 18-23.) In so arguing, SIA studiously avoids the plain language of Section 36, which defines "branch" to encompass only facilities carrying on enumerated banking functions concededly not performed by discount brokerage offices, and which alone provides sufficient basis for affirming the Comptroller's

ruling. (*See* Sec. Pac. Br. at 15-19 (citing *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 689 (1986)).) Even if reference to interpretative guidance beyond the terms of Section 36 is necessary, the Comptroller's construction of the statute is entirely reasonable and should be upheld, particularly given the strong support provided by the McFadden Act's legislative history. (*See* Sec. Pac. Br. at 20-27.)

In its opening brief, Security Pacific noted that the Act addressed not only branching issues, but also "affirmed" the "business of buying and selling investment securities" which "national banks are now conducting." [5] S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926). (*See* Sec. Pac. Br. at 24.) Since Congress was obviously aware of the theretofore interstate nature of those national bank brokerage activities, this legislative history shows an unambiguous congressional intent to "affirm" (not prohibit) the conduct of national bank brokerage activities through interstate offices.[6] (*See* Sec. Pac. Br. at 24-25.)

[5] By the time the McFadden Act was passed, national banks had been providing brokerage services for almost twenty years, some banks doing so on an interstate basis. For example, when the Act became law, the security affiliate of National City Bank had at least 29 offices outside its home state of New York. *See* W. Peach, *The Security Affiliates of National Banks* 89 n.42 (1941). The first such affiliate was established in 1908 by the First National Bank of New York. *Operation of the National and Federal Reserve Banking Systems: Hearings Pursuant to S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1052 (1931) (*"1931 Senate Hearings"*). As early as 1913, the Pujo Report to Congress on the financial industry reported on the activities of national bank security affiliates. H.R. Rep. No. 1593, 62d Cong., 3d Sess. 55-106 (1913); W. Peach, at 148.

[6] As discussed above, such congressional intent is also indicated by Congress' omission of any locational limitations on brokerage activity in Section 2(b) of the McFadden Act, even though prior to enactment, such limitations were for a time included in the legislation as to the safe-deposit business, the other national bank activity authorized by Section 2(b) of the Act. *See supra* at 6-7.

Then in 1933, after such interstate offices had become even more numerous, Congress enacted the Glass-Steagall Act to regulate national bank securities activities. Therein, however, Congress made no effort to limit the location of national bank brokerage offices, and it thereby ratified the very interpretation of the McFadden Act the Comptroller rendered in this case: brokerage offices are not subject to the Act's branching restrictions. (*See* Sec. Pac. Br. at 25-27).[7]

SIA asks the Court to declare this history "immaterial to the issue here," claiming that these brokerage activities were engaged in by affiliates not directly owned by the national banks and were therefore "not [activities] conducted by the banks themselves." (SIA Br. at 16-17.) However, SIA's argument that no security affiliates were directly owned by national banks is incorrect. *Operation of the National and Federal Reserve Banking Systems: Hearings on S. 4115 Before the Senate Comm. on Banking and Currency*, 72d Cong., 1st Sess. 392 (1932) (*"1932 Senate Hearings"*) (statement of Eugene Meyer, Governor, Federal Reserve Board) (noting that at least some security affiliates were directly owned by national banks); W. Peach, *The Security Affiliates of National Banks* 68 (1941).[8] To the extent that the national bank security affiliates of that era were not directly owned, they operated in a manner virtually identical to the modern-day wholly-owned subsidiary, the form of ownership approved by the Comptroller in this

[7] During the early 1930's, Congress held annual hearings which in part considered national bank brokerage activities. *See, e.g., 1931 Senate Hearings, supra.* Through those hearings, Congress was informed of the nationwide scope of these activities. Yet, no concern was expressed that by establishing out-of-state offices, national banks were violating the branching provisions of the McFadden Act, enacted only a few years earlier.

[8] Although national bank ownership of stock in other corporations was restricted, national banks may have directly owned the stock of their affiliates as a result of the Edge Act, *see* W. Peach, at 68-70, or as a result of conversion from a state to a national charter. *Id.* at 70.

case. (*See* Sec. Pac. Br. at 5-6.) Such affiliates were structured to ensure that their shareholders were always identical to those of the national bank by which they were established.[9] *1931 Senate Hearings*, at 1056. *See also id.* at 192 (statement of Albert H. Wiggin, Chairman of Chase National Bank). And as Congress noted, "it goes without saying that, through identity of stock ownership, there is identity of real control." *Id.* at 1057. In any event, the legislative history relied upon by Security Pacific is highly relevant because contrary to SIA's revisionist characterizations, Congress certainly believed that brokerage activities were being "conducted by the banks" and that the security affiliates were anything but unrelated or "immaterial." (Quoting SIA Br. at 16-17.) Indeed, in enacting the McFadden Act provisions ratifying the securities activities being conducted by national bank affiliates, Congress characterized those activities as a "business which *national banks* are now conducting."[10] S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926) (emphasis added).

The McFadden Act was intended to expand the locations at which national banks could engage in the "business of banking," 12 U.S.C. § 24 (Seventh) (Supp. III 1985);[11] that is, the locations at which banks could per-

[9] Identity of stock ownership in national banks and their affiliates usually was achieved in one of three ways. First, the stock of the affiliate could be trusteed for the benefit of the shareholders of the bank. *1931 Senate Hearings*, at 1056; W. Peach, at 66. Second, each share of stock in the affiliate could be physically affixed to the share certificates of the bank, with provisions prohibiting the transfer of one interest without the other. *1931 Senate Hearings*, at 1056; W. Peach, at 67. Third, the shares of the affiliate could be owned by another affiliate, with the same restrictions on transferability. W. Peach, at 67-68.

[10] Similarly, the Glass-Steagall Act's subsequent regulation in the area in 1933 was addressed directly to national banks and not simply to their affiliates. (*See* Sec. Pac. Br. at 26-27.)

[11] *See also 1931 Senate Hearings*, at 404 (statement of Melvin W. Traylor, Chairman, First National Bank of Chicago) (noting that brokerage was not part of "the purely banking business, where you accept deposits and make loans").

form the functions enumerated in Section 36(f) (*i.e.*, receiving deposits, paying checks, lending money). But Congress never intended Section 81, Section 36, or any other provision of the Act to affect the locations, already widespread, at which national banks were conducting what Congress perceived as the distinct "business of buying and selling investment securities." Ch. 191, § 2(b), 44 Stat. 1226 (1927).[12]

II. SIA LACKS STANDING TO MAINTAIN THIS ACTION.

SIA asks the Court merely to wink at the "zone-of-interests" standing prerequisite in this instance, arguing that because SIA's members will face increased competition if national banks offer discount brokerage services nationwide, any issue as to SIA's standing "should be all but obviated." (SIA Br. at 26.) If the "zone-of-interests" prerequisite has any viability, this request cannot be obliged.

According to SIA, since this Court has held that non-bank entities have standing in other banking law cases, standing must exist here. (*See* SIA Br. at 28 (warning against "revers[ing] the rationale" of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S.

[12] Amicus curiae IBAA urges another interpretation of the branch definition in Section 36(f), contending that the McFadden Act was intended to promote "competitive equality" between state and national banks in all respects. (*See* IBAA Br. at 8-12.) IBAA argues that *any* activity that would give national banks a "competitive advantage" over state banks may be performed only at the bank's main office or branches. (IBAA Br. at 20.) But the McFadden Act was enacted solely to ensure the "'competitive equality'" of national banks and state banks "insofar as *branch banking* was concerned." *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (emphasis added). Section 36 thus addresses only certain enumerated banking functions Congress deemed to constitute branch banking, none of which is performed by the challenged discount brokerage offices. (*See* Sec. Pac. Br. at 15-17.)

150 (1970), *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curiam), and *Investment Company Institute v. Camp*, 401 U.S. 617 (1971)).) The cases cited by SIA, however, involved distinct banking laws enacted for different purposes.[13] In *Data Processing*, for example, the Court noted that the statute at issue broadly regulated certain competition between national banks and all non-bank entities. 397 U.S. at 155-56. In contrast, the purpose of the McFadden Act's branching provisions, as embodied in *both* Section 36 *and* Section 81, *see supra* at 3-4, was solely to ensure the competitive equality of national banks and state banks with respect to branch banking, *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966), not to regulate competition between banks and non-bank entities like SIA's members.[14] It is thus hardly "incongruous" (SIA Br. at 29) that while SIA might have standing to enforce substantive provisions of other banking laws, it lacks standing under the branching provisions of the McFadden Act.[15]

---

[13] SIA's suggestion that those cases and the instant matter all arose under the same legislation—the "National Bank Act"—is misleading. (SIA Br. at 28.) While this case arose under the McFadden Act, *Data Processing* and *Arnold Tours* involved standing under Section 4 of the Bank Service Corporation Act of 1962, Pub. L. No. 87-856, 76 Stat. 1132, and *Investment Co. Institute* concerned Section 16 of the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933).

[14] The McFadden Act's branching provisions were not intended to be broad restrictions on "the scope of national banks' activities." (SIA Br. at 29.) The fundamental approach of the Act's branching provisions—to delegate authority to the states to determine the location of national bank branches—would have been a curious and highly indirect method of broadly curbing national bank activity.

[15] In invoking a statute intended to protect all competitors, it may not be necessary for a competitor-plaintiff "to 'rely on' . . . legislative history showing that Congress [specifically] desired to protect' " him. (SIA Br. at 27 (quoting *Arnold Tours*, 400 U.S. at 46).) But by the same token, legislative history clearly indicating that a statute's zone of interests is to include only national and state banks cannot be ignored by allowing non-banks to avail themselves of the statute's protections merely because they suffer an alleged injury.

CONCLUSION

For all of the foregoing reasons, as well as those stated in its opening brief, petitioner respectfully submits that the decision of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:

EDWARD J. MCANIFF
FREDERICK B. MCLANE
O'MELVENY & MYERS
400 S. Hope Street
Los Angeles, California 90071

RUSSELL A. FREEMAN
SECURITY PACIFIC
NATIONAL BANK
333 S. Hope Street (H54)
Los Angeles, California 90071

ARTHUR A. FRITZ
SPC SECURITIES SERVICES CORP.
333 S. Hope Street (H23-80)
Los Angeles, California 90071

WILLIAM T. COLEMAN, JR.
Counsel of Record
MARK WOOD
JOHN H. BEISNER
JACOB M. LEWIS
STUART A. STREICHLER
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

Dated: October 27, 1986

NO. 85-971
NO. 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Petitioner,
V.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,
V.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA URGING REVERSAL

DAVID CRUMP
Professor of Law
South Texas College of Law

JEAN F. POWERS
Visiting Assistant Professor
of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America respectfully moves for leave to file the attached brief of amicus curiae pursuant to Rule 42 of the Revised Rules of this Court and would show the Court as follows:

1. Identity of Amicus Curiae: The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. It is located on the campus of the South Texas College of Law in Houston and shares certain activities and personnel with the law school. LFA has expertise in matters of economics and public policy. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, academics and businesspeople.

2. Interest of Amicus Curiae: Among LFA's principal aims are the improvement of the use of the market system of resource allocation and removal of unreasonable regulation. LFA has participated as amicus curiae in this honorable Supreme Court, in the federal courts of appeals, in federal district courts, and in the courts of the several states, in pursuit of these goals. It has supported reliance on the market or has attempted to enhance the efficiency of regulation in such diverse industries as broadcasting, health care, natural gas production, mining, insurance, and commercial lending.

3. Desirability of an Amicus Curiae Brief: The decision under review affects the potential for procompetitive benefits in one of the most fundamental markets in our economy, the capital market. The legitimacy of that decision depends in turn upon the interpretation of statutes and, hence, the discerning of legislative intent, as well as upon a review of the decision in its economic context. LFA's activities in regulatory cases have frequently required it to consider interpretation of statutes. LFA is in a position to do so from a perspective different from that of the parties, i.e., a perspective of public policy. Furthermore, LFA's expertise in the application of law to economic matters makes it likely that LFA can assist the Court in fully developing the issues in this regard. Although the parties are clearly represented by capable and diligent counsel, their perspectives on the case make it unlikely that all such issues will be developed in the absence of amicus curiae briefing.

4. Issues Briefed: Amicus curiae has briefed only the issue regarding the proper interpretation of the McFadden Act, both from a traditional statutory interpretation standpoint and a public policy focus.

5. Previous Appearance in a Related Case: LFA has previously appeared as amicus curiae in this Court in the case of *Securities Industries Ass'n v. Board of Governors*, 104 S. Ct. 3003 (1984), and in the Second Circuit Court of Appeals in *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453 (2d Cir. 1985), cases which presented questions closely related to those in the case at bar.

6 *Requests for Consent of Parties:* Amicus curiae timely requested consent of all parties. The consent of petitioners Robert L. Clarke, Comptroller of the Currency, and Security Pacific National Bank has been received and is included herewith. Consent of respondent Securities Industry Association has been denied.

For the foregoing reasons, this Motion for Leave to File Amicus Curiae Brief should be granted.

Dated _____, 1986.

Respectfully submitted,

Jean F. Powers
Visiting Assistant Professor
of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amicus Curiae

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements made in paragraphs 1 and 2 of the Motion for Leave preceding this brief, as showing the interest of amicus curiae.

SUMMARY OF ARGUMENT

Discount brokerage services are not included in the definition of branch banking in the McFadden Act. Their inclusion would not serve the purpose of the Act, because they do not involve competition for banking services. The opinions of this

Court hold that the decision of the Comptroller on this matter should be given "the greatest deference."

The ability to operate discount brokerages allows banks the flexibility needed to maintain their viability in a changing financial community. Further, by making such services available at greater convenience and less expense, banks are able to better serve the public.

ARGUMENT

I. THE DECISION OF THE COMPTROLLER IS CONSISTENT WITH BOTH THE PLAIN LANGUAGE AND THE STATUTORY PURPOSE OF THE McFADDEN ACT, AND SHOULD BE GIVEN DEFERENCE BY THE COURTS.

A. The subsidiaries at issue in this case are not branch banks, either by definition or by a purpose interpretation of the McFadden Act.

As defined in the McFadden Act, "branch banks" include bank offices at which "deposits are received, or checks paid, or money lent." 12 U.S.C. sec. 36(f) (1982). The discount brokerages considered herein perform none of these functions. *See Decision of the Comptroller of the Currency, Comptroller's Petition for a Writ of Certiorari,* Appendix D, pp. 39a-41a. Respondents contend that such offices are nonetheless "branch banks" by applying the argument that, since the definition states that a branch "includes" offices at which the above activities are carried on, "it may include more." Brief in Opposition to Petition for Writ of Certiorari at 3, *quoting First National Bank in Plant City v. Dickinson,* 396 U.S. 122, 135 (1969).[1] Amicus

1 The statement by the Court that the definition of branch banking "may include more" than the three enumerated functions was not controlling in *Plant City*, since the activity being considered there, the receipt of money by armored cars and off-premises receptacles, was found to constitute receipt of deposits. *Plant City*, 396 U.S. at 137.

does not dispute that the use of the word "include" in the definition adds flexibility to the interpretation of the statute. However, a recognition that the definition *may* include activities not specifically mentioned in the definition, does not mean that it *must* include any other activity in which the bank could be engaged, or there would be no reason to list the activities in the definition. *See Comptroller's Petition for a Writ of Certiorari* at 17. The securities brokerage activity involved in this case should not be included in the definition of branch banking for the reasons set out herein.

When the application of a statute to a particular situation is unclear, a review of the legislative purpose and an analysis of the "true intent" of the legislature can be helpful interpretative tools. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION sec. 45.09 at 40, 41. Finding the legislature's "true intent" involves a four-step process of asking "what was the law before the act, what was the mischief or defect to be corrected, what was the remedy designed to cure the defect and what was the true reason of the remedy." J. DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL sec. 43-4 (1975). The answers to these questions support the conclusion that the statute does not apply to the case at hand.

The law before the act did not deal specifically with branch banking, and therefore national banks were unable to branch. State banks, on the other hand, were not generally so restricted, and in the early part of this century began to expand geographically along with the expansions that were taking place in society and the economy. *See* E. SYMONS & J. WHITE, BANKING LAW: TEACHING MATERIALS 97 (2d ed. 1984). By the end of 1923, when national banks were allowed *no* branches, state banks had a total of 2,054 branches. *First National Bank v. Walker Bank and Trust,* 385 U.S. 252, 257 (1966).

The obvious defect in this system is the severe competitive disadvantage of the *national* banks. The Comptroller stated in his Annual Report of 1923 that if this situation were allowed to continue, it would "mean the eventual destruction of the national banking system." H.R. Doc. No. 90, 68th Cong., 1st Sess.

6 (1924). The House of Representatives stated that the situation was "intolerable to the national banking system." H.R. Rep. No. 83, 69th Cong., 1st Sess. 7 (1926). *See generally, Walker Bank, supra,* at 256-258.

The remedy in the McFadden Act, designed to prevent the destruction of the national banking system, was to allow national banks to establish branches in those states where branch banking was permitted, to the extent the state banks were allowed to branch.[2] Given the prior history, this remedy was not adopted as a limitation on national banks, but rather as an expansion of their powers, protecting their very existence.

The true reason for the remedy chosen by Congress thus appears clear: "to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" *Walker Bank,* 385 U.S. at 261 (emphasis added). The competitive equality of state and national banks as banks is not disturbed, and the existence of either is not jeopardized,[3] when national banks are allowed to operate subsidiaries for discount brokerage services. The securities brokerage business, while closely related to banking, is a nonbanking activity, *see Securities Industry Ass'n v. Board of Governors,* 104 S. Ct. 3003, 3006, 3007 n. 9 (1984), and there is therefore no competition for basic banking services implicated. There is no reason why a customer could not easily choose to use the discount brokerage services

2 The original version of the McFadden Act allowed national banks to branch "within their home city if state law permitted state banks to do likewise," Comment, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks,* 72 KY. L. J. 707, 713 (1983-84), but was amended in 1933 to allow national banks to branch "on the same basis as the state banks." *Id.* at 714.

3 The Glass-Steagall Act protects against the risks which might otherwise be involved by specifically providing that banks may buy and sell securities *only* for the account of bank customers. 12 U.S.C. sec. 24 Seventh (1982). Furthermore, the brokerage activity involved herein actually enhances the financial integrity of banks as is discussed in Part II of this brief.

offered by one bank, and yet choose another bank for his basic banking services, in much the same manner that many customers choose a credit card service of a bank other than the bank they use for basic banking.

B. Deference to the decision of the Comptroller is especially appropriate in this case.

The Comptroller has already pointed out the need for deference in a case such as this where the statute contains a "calculated indefiniteness," Comptroller's Petition for a Writ of Certiorari at 15-16, and where the court's interpretation would "disrupt long-settled practice in the banking industry." Id. at 16. Amicus would like to add that in matters of banking or financial regulation, the courts have not only granted deference to administrative bodies, but have given them "the greatest deference." *Board of Governors v. Investment Co. Inst.,* 450 U.S. 46, 56 (1981). The reasons for deferring to the Board's expertise apply equally to decisions of the Comptroller.

> Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it. Accordingly their judgment in such matters should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority.

Board of Governors v. Agnew, 329 U.S. 441, 450 (1947).

Further, as this Court has frequently pointed out, an administrative interpretation need not be the one the court would have made if it were confronted with the problem in the first instance, nor need it be the only reasonable interpretation. In a situation such as this, where the administrator is charged with the initial decision making, the interpretation need only be a reasonable interpretation. *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 104 S. Ct. 2472, 2480 (1984); *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 103 S. Ct. 1921, 1933 (1983); *Unemployment Compensation Comm'n v. Aragan*, 329 U.S. 143, 153-54 (1946). The Comptroller's interpretation in this case is not only reasonable, but desirable.

II. THE DECISION OF THE COMPTROLLER IN THIS CASE BETTER SERVES THE NEEDS OF THE FINANCIAL COMMUNITY AND THE PUBLIC THAN DOES THE DECISION OF THE COURT OF APPEALS.

In addition to the purpose of promoting competitive equality, another important purpose of the McFadden Act appears in the following quote of Representative McFadden:

> As a result of the passage of this act, the national bank act has been so amended that national banks are able to *meet the needs of modern industry and commerce* and competitive equality has been established among all member banks of the Federal reserve system.

68 Cong. Rec. 5815 (1927) (emphasis added). This purpose of meeting the needs of the modern financial community cannot be ignored if the banking system is to retain its vitality. Indeed, the McFadden Act itself came about as a response to needs created by the effects of social and economic changes on branch banking. *See* SYMONS & WHITE, *supra*, at 97.

The financial community is again undergoing significant changes. As a result, a decision such as the one rendered herein, while having little impact on the competitive equality of national banks and state banks, has significant impact on the competition the banking industry as a whole faces from other types of financial services institutions. This competition is not addressed by the McFadden Act. As has been stated in a recent law review article:

> . . . Commercial banks are increasingly becoming part of a broader financial services industry . . . The thrift industry is now directly competing with banks but is not subject to the constraints of the McFadden Act. . .
>
> Several nondepository institutions have entered the financial service industry. Brokerage firms offer the equivalent of checking accounts but pay market interest rates. Sears, Roebuck & Company is establishing a nationwide network of financial service centers within their department stores. American Express . . . also has an impressive interstate network. Bankers are beginning to view these institutions as direct competitors.

Comment, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks*, 72 KY. L. J. 707, 722-723 (1983-84) (footnotes omitted). Banks as institutions must be able to respond to change by developing their services in appropriate areas. Based on this Court's decision in *Securities Industry Ass'n v. Board of Governors*, discount brokerage service appears to be an appropriate area. It would be ironic if the McFadden Act, designed to preserve the financial integrity of national banks and allow them to respond to social and economic change, became in this instance the ultimate obstacle preventing needed changes.

The overly broad interpretation of the McFadden Act in this case also does a disservice to the public. In its *Securities Industry Ass'n* opinion, this Court reiterated the benefits to the

public which would accrue from the acquisition of a discount securities brokerage by a bank holding company. These benefits, identified by the Board of Governors, were "the increased competition and the increased convenience and efficiencies that the acquisition would bring to the retail brokerage business." *Securities Industry Ass'n*, 104 S. Ct. at 3007. There is no reason these benefits should be lost to certain segments of the public because of an unnecessarily broad statutory interpretation.

A recent law review article discussing the situation in Texas provides meaningful insight into the problem. The author points out that discount brokerage services are offered at additional locations in Texas, despite the state's prohibition of branch banking, emphasizing that since "the bank brokerage industry has not been proven to produce any of the ills sought to be avoided by the passage of the Glass-Steagall Act, the enforcers of branch banking laws have not made an asserted effort to pursue the letter of the law in this industry." Osborn, *Discount Brokerage Services, The Glass-Steagall Act, and Branch Banking in Texas*, 16 ST. MARY'S L.J. 185, 209 (1984).[4] The willingness to allow such services in a state which prohibits branching stems not only from the fact that no real detriment is involved, but from the additional fact that offering the services is beneficial to the bank and to the community. He observes that any arguments favoring prohibition "are seemingly outweighed by the arguments of an expanding economy and the desire of the public to have certain services made more convenient and at a lesser cost" at its option. *Id.* at 210. The Second Circuit Court of Appeals has specifically considered consumer demand when, as here, the industry has already become very involved in responding to new developments. As that court said, " . . . if the momentum already developed should be stopped, it should be done by Congress, and not by this court, particularly when the barrier we are asked

4 The author had previously concluded that, although the Texas courts had not addressed the question, the operation of such services is at least a technical contravention of "the letter of the law" in Texas, based in part on the district court's reversal of the Comptroller's decision herein. 16 ST. MARY'S L.J. at 207-209.

to impose would be based upon definitions framed over 50 years ago." *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453, 462 (2d Cir. 1985). The same considerations support the Comptroller's interpretation of the statute herein.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

Jean F. Powers
Visiting Assistant Professor
of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amicus Curiae

(7) (8)

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Associate General Counsel-Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae

May 16, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED FOR REVIEW

Whether the McFadden Act is applicable to offices of a national bank at which no money is lent, no deposits accepted and no checks paid.

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of the parties, to urge the Court to reverse that part of a decision by the United States Court of Appeals

for the District of Columbia Circuit which held that discount brokerage offices of national banks are "branches" of the banks and therefore governed by the geographical limitations upon the location of "branches" of banks imposed by the McFadden Act, 12 U.S.C. § 36.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. Its membership includes banks chartered by the Comptroller of the Currency ("national banks") and banks chartered by the states in which they are located ("state banks"). ABA member banks are located in each of the fifty states and the District of Columbia. The Association frequently appears in litigation, either as a party or as an amicus curiae, in order to represent the interests of the banking industry at large in particularly important cases. The Association has appeared as amicus curiae in this case in the District Court, the Court of Appeals, and on the Petitions for Writ of Certiorari in this Court.

The McFadden Act provides that the term "branch" includes any place of business, other than the main office of the bank, at which deposits are received, checks paid or money lent. 12 U.S.C. § 36(f). Commercial banks perform many services for their customers other than the three enumerated functions. Some of these services are offered to the public in competition with other industries (such as the securities industry, whose representative is the respondent in this case) which are not subject to federal law restrictions upon their ability to do business in any

convenient location selected by them. It is, accordingly, of great importance to the commercial banking industry in terms of its capacity to compete in the marketplace that the McFadden Act not be read any more broadly than its plain language requires.

SUMMARY OF THE ARGUMENT

Historically, the purpose of the McFadden Act was to permit national banks to establish full service branch offices in those states where state-chartered banks were permitted to do so, and then only to the extent that state-chartered banks were permitted to establish branches. The law did not deal with places of business of national banks (already in existence) which were not branches. Unlike full service branches, those places of business were not unlawful before the McFadden Act, and they did not become unlawful by reason of the McFadden Act. The decisions of the courts below thus turn the legislative history on its head by construing a statute designed to authorize additional places for the conduct of a general banking business by national banks as one *prohibiting* places of business whose existence was not even in issue at the time the law was enacted.

ARGUMENT

The McFadden Act became law on February 25, 1927. It provided in relevant part that a national bank could establish branches wherever, within the state in which the bank was situated, a state-chartered bank could, by state statute, establish a branch. 12 U.S.C. § 36(c). The law also defined "branch" to *include* "any branch bank, branch office, branch agency, additional

office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f) (emphasis supplied).

In this case, Union Planters National Bank of Tennessee and Security Pacific National Bank of California sought and received permission from the Comptroller of the Currency to acquire or establish, as operating subsidiaries of the banks, discount brokerage operations. A discount broker is a securities broker which "does not provide investment advice or analysis, but merely executes the purchase and sell orders placed by its customers." *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 104 S. Ct. 3003, 3005 n. 2 (1984). In both cases, it was anticipated that the operations of the discount brokerages would take place in offices other than the main office and authorized branches of the two banks, and that such offices might well be located in states other than Tennessee and California. At such offices, no deposits would be received, no checks paid, and no money lent.

If the McFadden Act had used the word "mean" instead of "include" in the definition quoted above, there is little doubt that the discount brokerage offices of the banks here in issue would fall outside the definition and would not be bound by the law's geographical restraints applicable to branches. But as this Court has held, the use of the word "include" creates a certain "indefiniteness with respect to the outer limits of the term." *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 135 (1969). The three enumerated functions define "the minimum content

of the term 'branch' ". *Id.* The definition "*may* include more." *Id.* (emphasis supplied.)[1]

Given the lack of precision in the language of the statute itself, it is crucial to understand the historical context in which the McFadden Act was passed sixty years ago in order to apply that Act to the present case.

At the time the McFadden Act was debated and passed by Congress, there was a commonly understood and long-standing distinction between bank "branches" and other places of business of banks which were neither the "banking house" nor "branches" of the banks. A 1911 opinion of the Attorney General describes the distinction in considerable detail:

> In a branch bank bills of exchange are negotiated and discounted; moneys received for deposit; exchange, coin and bullion are bought and sold; money is loaned, and *every kind of banking business that is authorized is there transacted*, unless it be the issuing and circulating of bank notes.

29 Op. Atty. Gen. 81, 94 (1911) (emphasis supplied).

According to the Attorney General, banks were not permitted to establish branches at which a general banking business was carried on in the absence of

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[1] In *Plant City*, the Court did not decide that the definition *does* include more, nor did it specify what more might be included within the definition. It was unnecessary for the Court to do so, since the alleged "branch" in that case was found to be engaging in the business of receiving deposits, and therefore fit within the plain meaning of the statute.

express legislative authority. *Id.* at 90. However, there was a "vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." *Id.* at 87. While "branches" were illegal in the absence of specific legislative authority, the establishment of "agencies" was deemed to be within the implied powers of banks. In support of his conclusions, the Attorney General quoted from several learned treatises of the time:

> In Morse on Banks and Banking, section 46, it is said: "Agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange, may be established in other places. In these cases, it is for the convenience of the public that such should be the case. But there is no case which holds that an agency for the exercise of the more important and valuable functions, such as issuing circulating paper or discounting notes, or any agency designed to carry on the general business of banking, would be regarded as legal, for such nominal establishment of agencies might easily result in the practical establishment of a network of branch banks throughout the home State or in other States."
>
> In 1 Morawetz on Corporations, section 387, it is said: "Banking corporations have implied authority to create agencies for special purposes, such as the redemption and purchase of bills of exchange and other securities, wherever this may be advantageous in carrying on their business; but they have no right to establish branch banks in the absence of express authority conferred by charter.

Id. at 88.

> These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business.

Id. at 86.

The Attorney General went on to conclude that there was no explicit statutory authority for national banks to establish branches. He believed that, under some circumstances it might be good policy for some national banks to have branches, but that "such a power can be granted only by Congress." *Id.* at 96. A dozen years later, a successor to the Attorney General concurred in this opinion. At that time, the applicable statute, Section 5190 of the Revised Statutes provided that "[t]he usual business of such national banking associations shall be transacted at an office or banking house located in the place specified in its organization certificate." The Attorney General observed that

> section 5190, R.S., relates to the "usual business" which, in my opinion, is to be construed the general banking business usually conducted by national banks. *There is no statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the association.*

34 Op. Atty. Gen. 1, 3 (1923) (emphasis supplied).

The following year, this Court took up the question of the ability of national banks to establish branches. A national bank opened, in the city of St. Louis, "a

branch bank for doing a general banking business." *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 655 (1924). Missouri had a law providing that "no bank shall maintain in this state a branch bank or receive deposits or pay checks, except in its own banking house." *Id.* The state sought to enforce this prohibition against the bank. The bank argued that, as a federal instrumentality, it was not bound by state law. The Supreme Court disagreed, holding that state law applied to the bank unless that law was in conflict with federal law. In that case, federal law did not supersede state law because nothing in federal law permitted a national bank to establish branches. In support of its conclusion, the Court cited the "well-considered opinion" of the Attorney General rendered in 1911 to which we referred above. *Id.* at 658.

Of particular importance for present purposes, the Court held that

> the state statute, by prohibiting branches, does not frustrate the purpose for which the bank was created, or interfere with the discharge of its duties to the government, or impair its efficiency as a Federal agency. This conclusion would seem to be self-evident; but, if warrant for it be needed, it sufficiently lies in the fact that national banking associations have gone on for more than half a century without branches, and upon the theory of an absence of authority to establish them.

Id. at 659.

Thus, the Court had before it the wealth of examples of bank "agencies"—located at places other than the "banking house," and indeed across state

lines—recited in the 1911 Attorney General's opinion and still concluded that national banks had never had "branches" or the authority to establish branches at any time since the enactment of the National Bank Act in 1864. By necessary implication, therefore, this Court, too, adopted the common distinction between "branches" and non-branch business locations.[2]

The *First National Bank in St. Louis* decision thus firmly established the inability of *national* banks to establish branches. But in 1924, state-chartered banks in a number of states had been granted the authority, by state statute, to have or maintain branches. The direct and immediate result of the Court's decision was to prompt Congress to undertake a review of the branching issue. Congress, as well as the Attorney General and the Supreme Court, recognized and acknowledged the existence of national bank business locations which were not "branches." But Congress ultimately concluded that these limited service facilities were inadequate to allow national banks to meet the competition from state-chartered banks which were permitted to operate full service branches. *See* 66 Cong. Rec. 4,432 (1925) (Statement of Senator Pepper, chief Senate sponsor of the McFadden Act); H.R. Rep. No. 83, 69th Cong., 1st Sess. 6 (1926). Indeed, this Court has subsequently held that a principal purpose of the McFadden Act was to create a condition of "competitive equality" in the matter of branching, between state and national banks. *First National Bank in Plant City v. Dickinson*, 396 U.S.

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[2] Since the First National Bank in that case established what was clearly and admittedly a full-fledged branch office, the Court had no occasion to deal with any questions regarding the propriety of non-branch business locations of national banks.

at 131-134; *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 259-60 (1966). But it is clear that the McFadden Act dealt only with the ability of banks to establish branches. There was no need for Congress to deal with any "competitive equality" issues with respect to the establishment of non-branch business locations, since both state and national banks already possessed the implied power to operate such limited purpose facilities, and the McFadden Act manifestly did not change this result.

What the McFadden Act did do was to amend and broaden the former Section 5190 of the Revised Statutes to provide that the "general business" of a national bank could be conducted not only in the place specified in its organization certificate, as had previously been the law, but also "in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title" (12 U.S.C. § 81).

There remains, then, the question whether an office of a bank at which only the function of buying and selling securities for customers, on their order and for their account, constitutes the "general business" of the bank as that term was understood. If discount brokerage constitutes the "general business" of banking, then Brenner Steed and Associates, Inc. was engaged in the "general business" of banking prior to its acquisition by Union Planters National Bank.

Brenner Steed was a going concern, whose operations were not appreciably affected by its acquisition—only its ownership. However, Brenner Steed could not have been engaged in the "general business" of banking prior to its acquisition, since Tennessee statutes expressly make it unlawful "for any

person not so authorized to carry on a banking business" § 45-2-1701 Tenn. Code Ann. (1980). A person becomes "so authorized" by receiving a certificate of authority from the commissioner of banking. § 45-2-217 Tenn. Code Ann. (1980). Brenner Steed, not being a bank, never had such a certificate of authority.

Perhaps more to the point, however, is the fact that securities affiliates of national banks, which very much resembled the discount brokerage subsidiaries here in issue, existed prior to the passage of the McFadden Act, despite the lack of authority for national banks to establish "branches" in the absence of explicit statutory enactment. Obviously, such securities affiliates were not then deemed to be "branches," but rather were considered to be perfectly legal particular purpose facilities within the implied powers of the banks. After the McFadden Act was passed in 1927, the securities affilates of national banks continued to operate, even in places where it would not have been proper for the banks to have "branches." The securities affiliates continued to exist, unremarked and unchallenged by any bank, any competitor industry, any regulator, any court or any Congressman until the effective date of the Glass-Steagall Act in 1934, when those affiliates disappeared for reasons wholly unrelated to the "branching" limitations imposed by the McFadden Act. It is therefore equally obvious that securities affiliates of national banks were not intended to be treated as "branches" of the banks, nor as engaged in the "general business" of banking by the McFadden Act either. This Court has held that the universal behavior of entities regulated by an Act after its passage, though not conclusive, at least supports the view that the

Act actually means what they understand it to mean. *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 104 S. Ct. 2979, 2992 (1984).

The history of securities affiliates of national banks is set forth in detail in the published records of hearings held in the Senate in 1931. *See Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency*, 71st Cong., 3d Sess. (1931) (hereinafter referred to as "Hearings").

The first securities affiliate of a national bank was established by the First National Bank of New York City in 1908. (Hearings at 1052). The National City Bank, New York, followed suit three years later—the same year the Attorney General opined that national bank "branches" would be illegal, but particular purpose facilities would be proper—and most of the other large banks in New York and elsewhere did likewise over the next ten years. (Hearings at 1054).

The securities affiliates of national banks took a variety of forms, but of particular interest to the present case is the affiliated corporation "a controlling interest in which is held by the bank." (Hearings at 1054). That is precisely the case before this Court now, and that kind of affiliate existed fifty-five years ago—four years after the McFadden Act.

Similarly, the securities affiliates of national banks, as they existed fifty-five years ago, performed a variety of functions, but of particular interest here is the fact that the typical affiliates acted as "[r]etailers of securities, maintaining corps of salesmen and often branches in other States than that in which the bank operates for the distribution of stocks and bonds to

institution and private investors." (Hearings at 1057). Here, of course, the brokerage subsidiaries of the national banks engage in more limited functions—retail brokerage of securities rather than "distribution" of securities as that term is now understood. But in 1931, four years after the McFadden Act, securities afffiliates of banks operated at locations across state lines, those locations being treated as branches of the affiliates, not of the bank itself. If the McFadden Act did not bar those activities in 1931, it should not be construed, in 1986, to bar the out-of-state offices of a discount brokerage subsidiary of a national bank. Congress is presumed to know its own laws, *United States v. Hawkins*, 228 F.2d 517, 519 (9th Cir. 1955), and yet at the time of the 1931 Hearings, there is not the slightest hint, anywhere, that the Congress thought it the least bit odd, from the perspective of the McFadden Act, for national banks to operate securities offices essentially any place the banks chose.

CONCLUSION

The McFadden Act enumerates three functions, the performance of any one of which by an office of a national bank would make that office a "branch." There is no compulsion in the plain language of that statute to read the definition of branch any more broadly than that, nor is there any warrant in the history surrounding the enactment of the statute for doing so. Consequently, an office of a national bank limited in its functions to the retail brokerage of securities, and which does not lend money, pay checks or receive deposits is not a "branch" of the bank

within the meaning of the Act. The contrary decision of the District of Columbia Circuit should be reversed.

Respectfully submitted

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Associate General Counsel-
Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-4240

Attorneys for Amicus Curiae

(8) (9)

Nos. 85-971 and 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE,
Comptroller of the Currency,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

CRAIG ULRICH *
MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1300 N. 17th Street, Suite 1200
Arlington, VA 22209
(703) 276-1750
Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C 20001

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BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Consumer Bankers Association (CBA) is a non-profit organization founded in 1919. It provides a national voice for the consumer financial services industry. The membership of CBA includes over 600 commercial banks of all sizes, as well as thrift institutions, credit

unions and others. Many of the major national banks in the United States are CBA members. Combined, the CBA membership holds over 70 percent of all the outstanding consumer credit held by commercial banks and over 80 percent of the consumer deposit accounts held by commercial banks.

CBA members are vitally affected and directly concerned with the proper interpretation of federal banking laws such as the McFadden Act. Until the decisions below, this law and the federal policies pre-dating and underlying its passage had been generally interpreted by federal authorities, and were understood by the national banking community, as authorizing a wide array of national banking activities without locational constraint. Indeed, McFadden (at 12 U.S.C. § 36(f)) expressly addresses the location of only three activities—taking deposits, paying checks and lending money.

The decisions below read McFadden as restricting *all* national banking activities to branch or headquarters locations. In their wake, they subject to challenge any national banking operations conducted at places other than a bank headquarters or branch office. In effect, these decisions threaten a torrent of litigation undermining 200 years of national policies and practices aimed at fostering the efficient and convenient provision of consumer financial services nationwide.

The national banking industry and consumer financial services marketplace have been cast into uncertainty and disarray by the revisionist interpretations of federal law in the decisions below. The views presented with consent of the parties in this brief will aid the Court in assessing the scope and historical purposes and experiences underlying McFadden and related federal laws and policies in this area. Ultimately, amicus curiae respectfully submits that those assessments will encourage the Court to overturn the decisions below.

SUMMARY OF THE ARGUMENT

The decisions below should be overturned because they (1) misconstrue the McFadden Act and directly contradict federal policies pre-dating and underlying it's passage, and (2) interpret the Act in a fashion that is incompatible with the American historical experience and national policies favoring the efficient and convenient provision of consumer financial services.

ARGUMENT

I. The Novel Interpretations of the McFadden Act in the Decisions Below Directly Contradict Federal Policies Pre-dating and Underlying It's Passage

Crucial to the reasoning of the courts below is the novel proposition that the McFadden Act (McFadden)[1] was enacted to limit the provision of banking services by national banks. Neither the historical context nor the underlying congressional intentions and actions support this view.

A. The McFadden Act Confirmed the Right of National Banks to Offer Banking Services At Multiple Locations

Federal banking law, policy and practice pre-dating the 1927 passage of McFadden authorized the provision of national banking services at multiple locations in both substance and effect.

Section 8 of the National Bank Act[2] provided, prior to McFadden's passage, that "(t)he general business of each national banking association shall be transacted in *the place* specified in its organization certificate." (em-

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[1] Act of February 25, 1927, c.191, §§ 7-8, 44 Stat. 1228-1229, as amended by Act of June 16, 1933, c.89, § 23, 48 Stat. 189, 190; presently codified, in pertinent part, at 12 U.S.C. §§ 36 and -81.

[2] Act of June 3, 1864, c.106, § 8, 13 Stat. 101 is presently codified at 12 U.S.C. § 81.

phasis added) Section 6 of the Act [3] requires a national association's organization certificate to specifically state ". . . (t)he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village." While the foregoing provisions may not be construed fairly to authorize the establishment of an unlimited number of national banks or branches within the designated "place", 29 Op. Atty. Gen. 81 (1911); see, also, State ex rel. Barrett v. First Nat. Bank, 297 Mo. 397, 249 S.W. 619 (1923), restored for argument, 262 U.S. 732 (1923), aff'd, 263 U.S. 640 (1924), it has long been apparent to this court that the designated "place" means one of the enumerated geographic areas and not a particular office or building, McCormick v. Market Nat. Bank, 162 Ill. 100, 44 N.E. 381 (1896), aff'd, 165 U.S. 538 (1987).

The National Bank Act was amended in 1865 to make it clear that state banks could retain their branches upon converting to national charters [4], thereby effectively authorizing the provision of national banking services at multiple locations more than 60 years before McFadden. From time to time, special acts of Congress were also passed permitting national banks to establish branches to serve consumers at various scientific and trade expositions around the nation [5] In 1886, Congress further underscored its determination not to specifically limit the situs of national banking activities by permitting associations to move the location of their discount and deposit operations within a 30 mile intra-state radius, subject only to prior shareholder and Comptroller approvals [6].

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[3] Act of June 3, 1864, c.106, § 6, 13 Stat. 101, is presently codified at 12 U.S.C. § 22.

[4] Act of March 3, 1865, c.78, § 7, 13 Stat. 484, now codified as a part of 12 U.S.C. § 36.

[5] State ex rel. Barrett, supra.

[6] Act of May 1, 1886, c.73, § 2, 24 Stat. 18, presently codified at 12 U.S.C. § 30.

In 1923, the Attorney General of the United States upheld the so-called "teller's window" rule adopted by the Comptroller, 34 Op. Att'y Gen. 1 (1923). That rule and the Attorney General's opinion distinguished between full-fledged branches and "additional offices" performing routine deposit and check cashing services in concluding that the teller's window was an authorized non-branch national bank operation.

Finally, the provisions of McFadden itself confirm the long-standing federal policies and practices permitting national banks to offer services at multiple locations. McFadden not only authorized national bank's to establish branches, it also permitted national (and converting state) banks to *retain* and operate pre-existing branches and authorized national banks to establish, in limited instances, "seasonal agencies" in resort communities to offer check cashing, deposit and related services, see 12 U.S.C. §§ 36(a), -36(b) and -36(c), respectively. Further, it did not address the "teller's window" or additional offices ruling, thereby upholding it by implication.

Federal policies and practices pre-dating McFadden's enactment evidence no particular congressional concern with strictly limiting the operations of national banks to particular facilities. McFadden itself does not expressly limit all national banking operations to branch offices per se. Nor does it contain an express statutory requirement that all business of a national bank shall be conducted at its "main office." To the extent that the courts below find in McFadden such restrictive purposes and requirements, it is respectfully submitted that they misread not only the language of the statute, but also the historical context and federal polices and actions preceding and underlying the law's passage. The strained reading in the decisions below of 12 U.S.C. § 81 in particular is as novel as it is incorrect.

B. McFadden Expanded The Authority Of National Banks to Provide Consumer Financial Services

During the first half of the nineteenth century, despite heavy anti-bank sentiment, there was little legislative activity at either the state or federal level designed to limit bank branching. The First Bank of the United States was organized in 1791 in Philadelphia and established branches in a number of cities around the new country. The legislative debates that accompanied the National Bank Act establishing the national banking system reveal no concern about banks expanding their economic bases through unrestrained branching. That lack of attention is fully understandable in light of the nature and shape of the market then being served. In a primarily rural economy, consumers expected to seek products and services of all types from the nearest population center. There was no expectation that financial or any other services would be situated more efficiently or conveniently.

Perhaps as a function of the understandable lack of congressional concern, early federal decisions interpreted the National Bank Act to prohibit formal branching, First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924), see also 29 Op. Att'y Gen. 81, 98 (1911). The issue was relatively unimportant to federal concerns focused on the preservation and encouragement of the dual banking system, however, since state banks were generally similarly limited by law or circumstance. That fact, combined with liberal chartering policies, resulted in a record number of bank offices throughout the country. In view of this proliferation of banks, the financial needs of businesses and consumers were met and there appeared to be little demand for added services through branching systems.

By the early 1900's, however, state banks were beginning to seek and obtain expanded authority to branch in order to serve their expanding geographic market-

places. Competitive pressures on national banks resulted in the previously discussed "teller's window" rule under which national banks could operate limited-service offices and agencies in the city in which they were located.[7]

This rule, together with the increasing branching authorization given to state-chartered banks, led to the passage in 1927 of the McFadden Act. The law was designed to increase the level of competitive equality between national and state-chartered banks and thereby preserve the consumer benefits and integrity of the dual banking system.

In order to effect these objectives, McFadden *expanded* consumer financial services powers of national banks by granting them explicit authority to open branches in the cities in which they were located if state-chartered banks had similar authority. Clearly, changes in consumer interests and needs were major factors encouraging this expansion of national bank authority. As stated by one member of Congress in explaining his vote in favor of such expansion:

> "I am persuaded to vote for this measure for the reason that crowded conditions, traffic regulations, lack of parking facilities in our cities necessitate some change in banking facilities to suit the convenience of the complex and crowded business world. Banks, bankers, and customers in large cities are in a situation similar to telephone, electric light and gas companies, or the post office, all of which have branches for the customer's convenience. Economy in time, energy, and many other factors demand that the old order give away to a modern and sensible plan. Party traditions and prejudices should not fetter or bind us to the detriment of our country or the service of our constituents."

66 CONG. REC. 1775 (1925) (remarks of Rep. Watkins)

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[7] Financial Services: The Changing Institutions and Government Policy, George J. Benston, Ed., Prentice-Hall, Inc. (1983), p. 13-14.

One effect of the McFadden Act was to reopen the issue of branch banking in the state legislatures. During the ensuing two or three years, a number of states enacted restrictions on branching within their states that applied not only to state-chartered banks but also, through the operation of the McFadden Act, to national banks. By 1930, the laws of 22 states prohibited branching.[8]

Following the Depression and the collapse of a number of banks, however, it was seen that unit banks fared relatively poorly in the struggle to survive as compared to banks with branches. As a result, between 1930 and 1935, 15 states either liberalized existing restrictions or enacted liberal branching laws for the first time. One impetus for this activity was the hope that failing banks could be merged with, or possibly become branches of, stronger institutions.[9]

To preserve competitive equilibrium in the dual banking system, Congress amended McFadden in 1933[10] to enable national banks to branch anywhere within a state that a state-chartered bank could branch. Once again, the authority of national banks to offer consumer financial services was expanded to better serve the convenience and needs of the changing society.

The decisions below cut directly against the grain of these developments in regarding the McFadden and Glass-Steagall changes as restrictions on the provision of consumer financial services. Worse, in straining to reach this perspective, they threaten to undermine long-

[8] Financial Services Industry—Oversight; Hearings Before the Committee on Banking, Housing and Urban Affairs of the United States Senate, Part I, 98th Cong., 1st Sess. (1983), p. 406-407. (statement of Frederick S. Hammer, E.V.P., Chase Manhattan Bank, N.A.)

[9] Id.

[10] Act of June 16, 1933, c.89, § 23, 48 Stat. 189, 190 (the Glass-Steagall Act).

standing federal policies underlying the progressive historical expansion of national bank authority and competitive equality in these areas. Ironically, these decisions substantially constrain national banking activities through a misinterpretation of federal laws and policies intended to have precisely the opposite effect.

C. The Decisions Below Effectively Undermine The Objectives of the Federal Reserve System

Another of the primary reasons for the passage of the McFadden Act was to encourage membership in the newly created Federal Reserve System (FRS).[11] With state banks being able to branch and national banks prohibited from branching, there was no incentive for state banks to join the system and considerable reason for national banks to convert to state charters and leave the FRS.[12] The FRS's control over the banking system was thereby weakened, contrary to the objectives of its enabling legislation.

To counter this trend, the Federal Reserve joined the chorus of those advocating the McFadden expansion of national banking authority.[13] To encourage FRS membership and further assure competitive equality between state, state member and national banks, state member banks were also covered by the branching rule. The "proviso" clause of 12 U.S.C. § 321[14], as interpreted in

[11] Financial Services: The Changing Institutions and Government Policy, George J. Benston, Ed., Prentice-Hall, Inc. (1983), p. 13-14.

[12] Id.

[13] Id.

[14] 12 U.S.C. § 321 reads, in pertinent part, as follows:

> *Provided, however,* That nothing herein contained shall prevent State member banks from establishing and operating branches in the United States or any dependency or insular possession thereof or in any foreign country, on the same terms and conditions and subject to the same limitations and restrictions as are

the FRS's Regulation H, 12 CFR § 208 et seq., and by most legal commentators, requires that branches of member banks must be established on the same terms and conditions as are applicable to branches of national banks under McFadden.[15]

As a result, the national banking restrictions embodied in the decisions below effectively limit the activities of state member banks. This places both national and state member banks at a competitive disadvantage with other institutions. These results directly conflict with some of the fundamental objectives of the Federal Reserve [16] and McFadden Acts. Once again, it is apparent that the decisions below effectively undermine the very federal banking policies and laws they purport to uphold.

II. The Decisions Below Are Incompatible With National Policies Favoring the Efficient and Convenient Provision of Consumer Financial Services

The review of federal actions and policies pre-dating and underlying enactment of the McFadden Act evidences the national priority accorded to the progressive expansion of consumer financial services. As the nation grew, the dual banking system evolved in part to ensure

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applicable to the establishment of branches by *national banks* except that the approval of the Board of Governors of the Federal Reserve System, instead of the Comptroller of the Currency, shall be obtained before any State member bank may hereafter establish any branch and before any State bank hereafter admitted to membership may retain any branch established after February 25, 1927, beyond the limits of the city, town, or village in which the parent bank is situated. (Emphasis added)

[15] Hearings on S. 2898 (To Promote Participation in Shared ATM Networks) Before the Committee on Banking, Housing and Urban Affairs, United States Senate, 98th Cong., 2d Sess. (1984), p. 65 (statement of Roland E. Brandel, Esq.)

[16] Act of Dec. 23, 1913, c.6, § 9, 38 Stat. 259, 12 U.S.C. §§ 221 et seq.

a continually improving responsiveness to the consumer financial services needs of a changing society. Increased competition directly benefitted consumers by ensuring the efficient and convenient provision of financial services nationwide.

The decisions below effectively limit the ability of national banks to adhere to these priorities. By requiring all national banking activities to be situated in the traditional brick and mortar of a main office or branch, these decisions choose to ignore logistical efficiency, the consumer's convenience and the realities of the contemporary marketplace. They effectively frustrate the efficient provision of national banking services by turning a blind eye to the social, economic and technological developments of the last 60 years.

By effectively hobbling one of the engines of federal consumer financial services policy, the decisions below represent an ill-considered approach to modern consumer affairs. The decisions below are incompatible with the national priorities in this area and should be overturned.

A. The "Constraints" In McFadden Are Aimed At Limiting Concentration Of Financial Resources, Not Geographic Diversity

Fundamental to the decisions below is the view that the locational restrictions of McFadden are an end unto themselves; that the law was specifically designed to geographically restrict the activities of national banks. We respectfully submit that this view lacks historical economic, social and political merit. In fact, the geographical constraints in McFadden were designed to prevent massive concentration of financial resources, to limit corporate ownership of banks and to insure local control.

American banking policies have always recognized the importance of encouraging a diverse banking system to

serve the interests and needs of a society founded on diversity. Limitations on the concentration of power over the nation's financial resources have long been regarded as essential to insuring the convenient and efficient provision of consumer services to the communities of the nation.

The federal government, over a 200 year history, has consistently reaffirmed its belief that decentralized control of banking structure provides the primary safeguard against undue concentration of financial resources. The veto by President Andrew Jackson in 1829 of the extension of the charter of the Second Bank of the United States, the enactment of the National Banking Act creating the dual banking system, and those provisions of the Federal Reserve System Act of 1913 [17] which created a series of regional reserve banks rather than a single central bank, were political and philosophical decisions designed to limit the concentration of power over financial resources.

So too were the passages, subsequent to McFadden, of the Federal Deposit Insurance Act,[18] assuring the continued survival of thousands of both small and large banks, and the Bank Holding Company Act of 1956, as amended in 1970,[19] reserving continuing control of bank structure to the states.

The decisions below suggest that McFadden should be read in a vacuum segregated from these economic and political realities. It is respectfully submitted that it

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[17] Id.

[18] Act of June 16, 1933, c.89, § 8, 48 Stat. 168, as amended (added section 12B to the Federal Reserve Act, originally codified at 12 U.S.C. § 264, now codified at 12 U.S.C. §§ 1811 et seq.).

[19] Act of May 9, 1956, c.240, § 2, 70 Stat. 133 (as amended by Act of Dec. 31, 1970, Pub. L. 91-607, Title I, § 101, 84 Stat. 1760) (presently codified at 12 U.S.C. § 1841).

cannot be properly read out of context with the national experience.

McFadden may be characterized as the lynch-pin insuring the continued diversity, creativity and innovation inherent in a decentralized banking system. Several key aspects of the American banking system that contribute to its strength and effectiveness derive directly from McFadden, including local control, competitive diversity, duality and national focus.

By retaining to the states the effective control of bank structure, McFadden embodies the longstanding federal recognition of the profoundly local concerns and interests that must be served by the banking community, Lewis, Comptroller of Florida v. BT Investment Managers, Inc., et al., 447 U.S. 27 (1980).

McFadden has fostered a financial diversity unparalleled in the Western world. Units of all sizes comprise the American banking system; the approximately 13,000 commercial banks range in asset size from over $100 billion down to less than a million. The largest banking organizations are approximately 1000 times as large as banks of average size.[20] Because of this multiplicity and disparity in sizes of institutions deriving from McFadden's prescription for local controls, there are far more financial services options available to the American consumer than exist in most, if not all, other nations![21]

In maintaining the equality of structural opportunities for national banks, McFadden fosters another major facet of the American banking system—duality.

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[20] Financial Services Industry—Oversight; Hearings Before the Committee on Banking, Housing and Urban Affairs of the United States Senate, Part II, 98th Cong., 1st Sess. (1983), p. 27 (statement of Sidney A. Bailey).

[21] Id.

The importance of the dual banking system to the consumer is nowhere more strongly evidenced than in its ability to encourage competitive innovation.

One system or another will develop new competitive approaches which, if proven useful, will be accepted universally. The various state systems usually have served as laboratories for change; occasionally, the federal system has so served. A noted state initiative is the NOW account. One could cite others. The critical element has been a creative tension between the two systems which leads to innovation and its diffusion. It is an essential attribute of the American banking system, one fostered and preserved by McFadden's passage, and a primary reason for its success.

McFadden's constraints are not aimed at restricting the ability of national banks to provide efficient and convenient consumer financial services. Indeed, they are directed toward encouraging the provision of such services by both state and federally-chartered banks. The decisions below, however, effectively frustrate these objectives in viewing McFadden as nothing more than a geographic barrier. They truly miss the forest for the trees by ignoring American banking's decentralized heritage and McFadden's anti-concentration objectives.

It is important to recall that the federal anti-trust laws are not responsible for the decentralized nature of the dual banking system. Although enacted almost a century ago, antitrust laws were not applied to banking until 1960. The antitrust laws always have applied to most other industries, yet, none of these industries exhibit the unconcentrated diversity of the 13,000 plus members of the commercial banking system. Only McFadden and related federal dual banking system policies are responsible for the decentralization that has resulted in the unparalleled competitive vigor of the American banking experience.

By ignoring McFadden's anti-concentration objectives and effects, the courts below unjustifiably limited the scopes of their interpretive reviews and their analyses are critically flawed as a result.

B. The Restrictive View of McFadden in the Decisions Below Ignores the Realities of the National Consumer Financial Services Marketplace

The decisions below virtually imply a federal policy intent on limiting the development of a national banking economy. This discussion has shown that such a policy has never existed. The following discussion focuses briefly on the truly national marketplace that federal policies have intentionally fostered.

A notable feature of the American system is its broad national applicability. Despite arguments that it is "state-bound," nothing could be further from the truth. With respect to most facets of banking—corporate and retail alike—a financial institution with the resources and the commitment can offer its services nationally.

On the corporate side, there is an expansion of nationwide lending, deposit-taking, data processing and other services through broad networks of loan production offices, calling officers, lockbox systems and specialized holding company affiliates.

On the retail side, many services are offered across state lines. Holding company subsidiaries offer consumer and retail mortgage credit services; many major banks have developed substantial credit card portfolios on an interstate basis and extensive interstate debit card systems are under development.

The ease with which funds flow through the system is augmented by several major elements of the financial network. One is the correspondent banking system where funds readily flow up and down the banking ladder and through which the most sophisticated services are pro-

vided. A second element is the easy access banks and other financial intemediaries have to national secondary markets such as those serving the residential mortgage and student loan markets. A third is the federal funds market, through which banks of all sizes buy and sell funds on a short-term basis.

Finally, the growing sophistication of the technology of today is a harbinger of fully electronic network banking tomorrow. Indeed, the technology already exists for statewide, regional, nationwide and even worldwide communication of financial information. These systems allow local institutions to exercise a favorable degree of control over the allocation of financial resources from each area. Each bank determines daily whether to buy or sell funds, thus insuring that individuals and communities have a voice in the allocation of their financial resources and that funds are available when local needs dictate. Conversely, when local needs are not strong, capital flows in response to needs of the nationwide market.

Using all these tools, modern consumer banking is clearly seen to be national in scope. The only element of banking which is heavily restricted is retail deposit-taking authority. Even here, states have moved to relax this restriction, and interstate gathering of retail deposits by mail remains a common occurrence.

The decisions below characterize McFadden as a geographic restriction on the rendering of national banking services. From the foregoing, then, it is clear that McFadden has been a dismal failure. Yet, that law has not been repealed and its operative philosophy has been incorporated subsequently in the Bank Holding Company Act. Either the courts below or Congress, the American consumer and the financial services marketplace are laboring under a misapprehension as to its efficacy.

It is respectfully submitted that the McFadden Act was never intended to place a geographic roadblock to

the nationwide provision of consumer financial services. Federal policies, historical experience and economic events pre-dating and subsequent to its passage underscore this. In erecting such a roadblock, the decisions below find no support in these policies, experiences and events. They should not be permitted to frustrate longstanding national objectives favoring the efficient and convenient provision of consumer financial services.

CONCLUSION

The decisions below have effectively hobbled the ability of the dual banking system to efficiently serve the consumer's convenience and needs. They ignore 200 years of progressively expansionist federal policies intended to effectuate these objects. They constitute a revisionist view of the federal banking law they purport to interpret. Their preoccupation with the brick and mortar provision of banking services is simply out of sync with contemporary market realities. They create significant uncertainty within the ranks of both national and Federal Reserve member institutions as to the propriety of the most de minimis of non-branch activities. The decisions below effectively undermine some of the major purposes and most beneficial effects of federal consumer financial services law and policy and should be overturned.

Respectfully Submitted,

CRAIG ULRICH *
MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1300 N. 17th Street, Suite 1200
Arlington, VA 22209
(703) 276-1750
Attorneys for Amicus Curiae

* Counsel of Record

May 16, 1986

No. 85-971
No. 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,

Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,

Respondent.

SECURITY PACIFIC NATIONAL BANK,

Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,

Respondent.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE

ROBERT S. RIFKIND
(Counsel of Record)
ELIZABETH S. STONG
RICHARD LIEBESKIND, JR.
One Chase Manhattan Plaza,
New York, N.Y. 10005
(212) 422-3000

Attorneys for The New York Clearing House Association as Amicus Curiae

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza,
New York, N.Y. 10005

Of Counsel.

May 17, 1986

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The New York Clearing House Association (the "Clearing House") is an association of 12 leading commercial banks that

are located in New York City.[1] It operates electronic payment systems and clears commercial drafts and items in the New York area. In addition, it files briefs as amicus curiae in appeals that raise significant questions of banking law. The Clearing House filed briefs as amicus curiae in support of the petitions for writs of certiorari before this Court, 106 S. Ct. 1259 (1986), and in support of petitioners-defendants in the Court of Appeals for the District of Columbia Circuit, 758 F.2d 739 (D.C. Cir. 1985), Pet. App. 1a-3a[2] and the District Court for the District of Columbia, 577 F. Supp. 252 (D.D.C. 1983), Pet. App. 10a-29a.

Members of the Clearing House have a direct and vital interest in the proper interpretation of Federal banking statutes such as the McFadden Act. The Clearing House believes that petitioner Comptroller of the Currency (the "Comptroller") properly exercised his authority under the Act in permitting petitioner Security Pacific National Bank to establish, and Union Planters National Bank to acquire, subsidiaries providing discount brokerage services to the public at sites other than existing bank branches. The Clearing House further believes that the views presented in this brief will aid the Court in its consideration of the issues arising under the McFadden Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals summarily affirmed a decision of the district court holding that banks may engage in discount securities brokerage, as the Comptroller had previously ruled,

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA and European American Bank.

[2] Citations to the record are to the Appendix to the Petition for Writ of Certiorari filed by the Comptroller of the Currency ("Pet. App.").

but that, contrary to the Comptroller's view, banks may conduct that business only at bank headquarters and "branches" within the meaning of § 7(f) of the McFadden Act, 12 U.S.C. § 36(f). The courts below also held that the Securities Industry Association ("SIA") had standing to challenge the Comptroller's ruling because its membership stood to lose profits if banks were to engage in discount brokerage without the locational fetters that SIA espouses and the courts below sustained. This Court denied SIA's petition for a writ of certiorari challenging the holding below that the Glass-Steagall Act permits banks to engage in discount brokerage, 106 S. Ct. 790 (1986). Hence, the only questions presented are where a bank may carry on that business, and whether SIA has standing to raise the issue.

For many decades national banks have engaged in two different types of activities: those activities that may be conducted only at bank headquarters or branches, and those that may be conducted at any location. Activities in the former category, as specified in § 7(f) of the McFadden Act, are taking deposits, paying checks and lending money. Activities in the latter category include a wide array of legitimate and useful activities that national banks have long conducted without locational constraint including, *inter alia*, trust account administration, credit card processing operations, equipment leasing, and loan production. The applicability of the constraints established by the McFadden Act to the former category but not the latter has long been relied on by banks, implemented by the Comptroller of the Currency,[3] and acknowledged by Congress (pp. 11-12 *infra*).

The branching provisions of the McFadden Act were intended to remedy certain competitive inequalities between state-chartered and nationally-chartered banks and have no bearing on competition between banks and others in the provision of securities brokerage services. *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). The Act cannot legitimately be invoked to shelter the securities industry from competition or to preclude commercial banks from participating effectively in the brokerage business.

[3] *See, e.g.*, 12 C.F.R. §§ 5.30(a), 7.7380(b) (1985).

The Comptroller, in a carefully considered opinion, found that discount brokerage offices owned by a national bank are not bank branches, since *none* of the three functions identifying a bank office as a branch—taking deposits, paying checks, or lending money—is involved in the operation of a discount brokerage service. Therefore, the Comptroller found, such offices may be maintained anywhere, and are not subject to locational restraint. *Security Pacific National Bank*, [1982-83 Transfer Binder] Fed. Banking L. Rep. ¶ 99,284 (CCH) (Comptroller of Currency 1982); Pet. App. 30a-46a. The Comptroller first determined that the Glass-Steagall Act permits "securities purchases and sales for customers in which the bank acts in the capacity of agent", *id.* at 86,256, Pet. App. 31a-39a, and "constitutes clear authorization for banks and, hence, their operating subsidiaries . . . to engage in the [discount brokerage] activities contemplated", *id.* The Comptroller then ruled that discount brokerage offices operated by a bank would not be bank "branches", as they would not perform any of the activities specified in § 7(f) of the McFadden Act, lending money, receiving deposits, or paying checks. *Id.* at 86,259-60, Pet. App. 39a-43a.

The district court affirmed the ruling of the Comptroller as to the Glass-Steagall issues but reversed the Comptroller's ruling that discount brokerage offices were not bank "branches". The district court held that the term "branch" should be read very broadly to encompass any location at which a bank conducts any activity "aimed at attracting and servicing customers conveniently", 577 F. Supp. 252, 260 (D.D.C. 1983), Pet. App. 28a. The court of appeals affirmed the ruling of the district court, by a 2-1 vote, in a two-sentence opinion, stating that it was in agreement with the result reached "generally for the reasons stated" by the district court. 758 F.2d 739, 740 (D.C. Cir. 1985), Pet. App. 2a. Suggestions for rehearing en banc were denied, with three judges dissenting. 765 F.2d 1196 (D.C. Cir. 1985), Pet. App. 4a-9a.

We show below that the decision of the court of appeals should be reversed and the Comptroller's ruling should be

sustained on the basis of the controlling language of § 7(f) of the McFadden Act (pp. 5-9 *infra*). Further, we show that the Comptroller's ruling is supported by the legislative history of the McFadden Act and by explicit Congressional acknowledgement of the conduct of activities by banks at non-branch offices (pp. 9-12 *infra*). Finally, we show that in reaching their erroneous conclusion, the courts below disregarded the principle that statutory restrictions on competition are not to be inferred absent explicit congressional command (pp. 13-16 *infra*), and that SIA lacks standing to assert this claim (p. 16 *infra*).

ARGUMENT

THE BRANCHING PROVISIONS OF THE MCFADDEN ACT DO NOT CONSTRAIN A NATIONAL BANK'S BROKERAGE ACTIVITIES.

The courts below erred in setting aside the Comptroller's holding that a discount brokerage office operated by a national bank is not a "branch" within the meaning of § 7(f) of the McFadden Act. In particular, the district court's conclusion that any location at which any activities "aimed at attracting and servicing customers conveniently" is a "branch" within the meaning of the Act, 577 F. Supp. at 260, Pet. App. 28a, is a departure from the statutory text unwarranted by legislative history, judicial construction and commercial practice, and inconsistent with the national policy favoring competition.

A. *The Plain Language and Legislative History of the McFadden Act Show That Discount Brokerage Offices Are Not "Branch Banks".*

The McFadden Act was enacted in 1927 to grant national banks the same freedom to establish branch banks as is enjoyed by the state-chartered banks with which they compete. *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). To that end, it provides that a national bank may establish bank branches in the state in which it is located to the extent that "such establishment and operations are at the time authorized to State banks by the statute law of the State in

question", 12 U.S.C. § 36(c)(2). It then defines "branch" in terms of the three basic and traditional services which banks provide:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia *at which deposits are received, or checks paid, or money lent.*" 12 U.S.C. § 36(f) (emphasis supplied).

This Court has previously addressed the question of whether a particular activity at a given location constitutes a "branch" within the meaning of the McFadden Act. In *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), the Court determined that a mobile teller's window, operating out of an armored car, was a branch within the statutory definition notwithstanding an attempt by the bank to define the "deposit" as occurring only at the bank's authorized office. In reaching that conclusion, the Court rejected the argument that the parties to the banking transaction could deem the deposit to occur elsewhere than at the mobile teller, and concluded, first, that the bank had gained a competitive advantage over state-chartered banks and second, that:

> "*the conduct of the parties and the nature of their relations bring First National's challenged activities within the federal definition of branch banking.* Here, penetrating the form of the contracts to the underlying substance of the transaction, we are satisfied that at the time a customer delivers a sum of money either to the armored truck or the stationary receptacle, the bank has, for all purposes contemplated by Congress in § 36(f), received a deposit." *Id.* at 137 (emphasis supplied).

Inquiry into "the conduct of the parties and the nature of their relations" discloses that the transactions at issue here are purchases and sales of securities and not transactions by which "deposits are received, or checks paid, or money lent." This is, thus, not a case in which the proscribed substance is camouflaged in permitted form. Neither form nor substance bear any resemblance to the enumerated activities.

If, as the district court supposed, the definition set forth in § 7(f) were so broadly inclusive as to embrace any activity by a bank or bank subsidiary "aimed at attracting and servicing customers conveniently", 577 F. Supp. at 260, Pet. App. 28a, there would have been no need for this Court to analyze "the conduct of the parties and the nature of their relations"; obviously the mobile teller's window in *Dickinson* was intended precisely to attract and service customers conveniently. Analysis was warranted to establish the nature of the services and to determine—over the contrary argument by the bank—that they included one or more of the three activities specified in § 7(f).[4]

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[4] The holding of *St. Louis County Nat'l Bank v. Mercantile Trust Co.*, 548 F.2d 716, 719 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (relied on below, 577 F. Supp. at 260, Pet. App. 27a), that "the three routine banking functions delineated in section 36(f) are not the only indicia of branch banking", was unprecedented and has not heretofore been followed. All other cases decided by the lower courts—including the cases cited by SIA (Cert. Opp. 4 n.6)—follow this Court's analysis in *Dickinson*. *E.g.*, *Colorado ex rel. State Banking Board v. First Nat'l Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (determination that "the withdrawal of pre-packaged packets of money, with a corresponding debit to the customer's checking or savings account . . . did not constitute 'checks paid' . . . unduly emphasizes form at the expense of substance and fails to follow the admonition of the Supreme Court in *Dickinson*"); *Illinois ex rel. Lignoul v. Continental Illinois Nat'l Bank & Trust Co.*, 536 F.2d 176, 178 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976) ("any order to pay which is properly executed by a customer, whether it be check, card or electronic device, must be recognized as a routine banking function"); *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921, 930, 938-48 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("the substantive issue in this case is whether all [automatic tellers] exhibit at least one of these indicia of branchness"); *accord, e.g., Independent Bankers Ass'n of America v. Marine Midland Bank, N.A.*, 757 F.2d 453, 462 (2d Cir. 1985); *Independent Bankers Ass'n of America v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980); *Utah ex rel. Dep't of Financial Institutions v. Zions First Nat'l Bank*, 615 F.2d 903, 905-06 (10th Cir. 1980); *State Bank of Fargo v. Merchants Nat'l Bank & Trust Co.*, 593 F.2d 341, 343 (8th Cir. 1979); *Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 554 F.2d 345, 351-53 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977); *Missouri ex rel. Kostman v. First Nat'l Bank in St.*

The district court used *Dickinson*'s passing reference to the indefiniteness of the statutory language as a warrant for draining § 7(f) of all defining character. While it is surely true that the statutory language, which uses the word "branch" in defining the term "branch", has a "circular aspect" and hence "may not be a model of precision", 396 U.S. at 135, it is, nonetheless, not devoid of meaning. Moreover, the respects in which it is imprecise are no more relevant here than they were in *Dickinson*. The "indefiniteness" in the statute does not concern the three enumerated activities, but rather the various places which will constitute branches if the enumerated activities are performed there:

> "The term 'include' in the statute does not relate to the activities involved but refers to the places at which the specified activities of receiving deposits, paying checks and lending money are carried out." *Continental Illinois Nat'l Bank & Trust Co. v. Lignoul*, No. 76-C-2209, slip op. at 17-18 (N.D. Ill. Nov. 9, 1976).

Similarly, this Court's holding in *Dickinson* that an armored car is a "branch" if deposits are accepted there demonstrates that the statute brings within its scope places not specifically enumerated (*i.e.*, places other than branch banks, branch offices, branch agencies, additional offices or branch places of business) if deposits are received, checks are paid, or money is lent there. Likewise shopping centers, *Colorado ex rel. State Banking Board v. First Nat'l Bank of Fort Collins*, *supra*, railroad stations, *Illinois ex rel. Lignoul v. Continental Illinois Nat'l Bank & Trust Co.*, 409 F. Supp. 1167 (N.D. Ill. 1975), *aff'd*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976), and factories, *Missouri ex rel. Kostman v. First Nat'l Bank in St. Louis*, 405 F. Supp. 733 (E.D. Mo. 1975), *aff'd*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976), can all be bank branches, notwithstanding the fact that these places are not enumerated in the statute, because at least one of the three specified activities is in substance performed there.

Louis, 538 F.2d 219, 220 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976); *Nebraskans for Independent Banking, Inc. v. Omaha Nat'l Bank*, 530 F.2d 755, 759 (8th Cir.), *vacated on other grounds*, 426 U.S. 310 (1976); *Independent Bankers Ass'n of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206, 1222 n.68 (D.C. Cir. 1975); *Jackson v. First Nat'l Bank of Gainesville*, 430 F.2d 1200, 1201-02 (5th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); *Cheshire Nat'l Bank v. Smith*, 427 F. Supp. 277, 281-82 (D.N.H. 1977); *Oklahoma ex rel. State Banking Board v. Bank of Oklahoma*, 409 F. Supp. 71, 90-92 (N.D. Okla. 1975).

Thus, the statutory text and its consistent construction indicate that, in defining a branch bank, Congress intended to reach those places—and only those places—at which at least one of these three basic banking functions are carried out. Likewise, the Act's legislative history and historical context confirm that natural and straightforward reading of the statutory language. At the time the McFadden Act was being considered by Congress, a "branch bank" was understood to be a place where banking business was "conducted as if it were a separate organization, . . . compet[ing] in all branches of the banking business with other banks in that locality the same as if it were an independent institution". 29 Op. Att'y Gen. 81, 88 (1911); *see* 34 Op. Att'y Gen. 1, 3-5 (1923). As the Solicitor General told this Court in 1924:

> "In so far as [the] practical operations [of a branch] are concerned, it is a *complete substitute* for a local bank in the locality which it serves. It engages in a *general banking business* in conjunction with and in subordination to, the parent bank." Brief of the United States in *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), *reproduced in part in* C. Collins, *The Branch Banking Question*, 65-66 (1926) (emphasis supplied).

Plainly, a discount brokerage office, which does not receive deposits, pay checks or lend money could not be "a complete substitute for a local bank", would not be perceived to be a bank, and therefore would not be deemed to be a "branch".

The McFadden Act was written against a background of locational constraints that grew out of a concern over the concentration and centralization of credit and a desire to protect

local banks from competitive pressures. *See, e.g.*, C. Collins, *The Branch Banking Question* 8 (1926); Vester, *Trends and Developments in State Regulation of Banks,* 90 Banking L.J. 464, 466 (1973). Whatever the merits of those concerns, they relate only to the traditional banking functions of making loans, receiving deposits and paying checks. A brokerage business in nationally traded securities, conducted solely on an agency basis, has nothing to do with control over credit facilities and, while competing with other firms engaged in securities brokerage, does not compete with local banks insofar as they are engaged in the traditional banking functions.

Furthermore, it is not every business conducted by a national bank that is subject to locational constraints. Congress has authorized national banks to engage in activities beyond those enumerated in § 7(f).[5] The legislative history of the branching provisions of the National Bank Act which preceded the McFadden Act, 12 U.S.C. § 81, makes it clear that the "general business" subject to locational constraint is coextensive with the enumerated activities in § 7(f), *i.e.*, paying checks, accepting deposits and making loans. Contemporaneous evidence of this understanding is found in the Attorney General's 1923 opinion on the scope of R.S. § 5190 (*codified at* 12 U.S.C. § 81), prior to its amendment by the McFadden Act. The statute then read:

> "The usual business of such national banking associations shall be transacted at an office or banking house located in the place specified in its organization certificate."

The Attorney General stated:

> "It is to be observed that section 5190, R.S., relates to the 'usual business' which, in my opinion, is to be construed [as] the general banking business usually conducted by national banks. There is no statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the association.
>
> ". . . [The association] may not, however, establish a branch bank to do a general banking business such as is usually done by national banks." 34 Op. Att'y Gen. 1, 3-4 (1923).

[5] *See, e.g., Securities Industry Ass'n v. Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985), Pet. App. 1a-3a, *cert. denied*, 106 S. Ct. 790 (1986); *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 468 U.S. 207 (1984).

Section 8 of the McFadden Act amended 12 U.S.C. § 81, substituting "general business" for "usual business" and permitting such business to be conducted not only at bank headquarters but also at branches as specified in § 7 of the Act.[6] We are not aware of any legislative history that would contradict the Attorney General's view that "general business" was synonymous with "usual business" and that "general business" did not embrace "all the business of a national bank". It should also be noted that to read the McFadden Act as subjecting the entire business of a national bank to locational constraints renders the specific enumeration of activities in § 7(f) meaningless surplusage. Indeed, had Congress intended to limit all activities, it would scarcely have needed to define "branch" at all.

The division of bank activities between those subject to locational limit and those not so limited has been recognized by Congress. In debating the International Banking Act of 1978, Congress took account of the fact that banks were engaged in substantial multistate activities that were not constrained by the McFadden Act.[7] In three years of hearings on the proposed act, Congress recognized that the McFadden Act imposed locational constraints on national banks, but not on foreign banks, in taking deposits, paying checks, and making loans,[8]

[6] 12 U.S.C. § 81 now provides:

> "The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title."

[7] Pub. L. No. 369, 92 Stat. 607 (1978).

[8] S. Rep. No. 1073, 95th Cong., 2d Sess. 8 (1978).

but found justification for accommodating multistate foreign bank activities in the fact that national banks were not so constrained in the conduct of other aspects of their business.[9] This Court has frequently recognized that such congressional assessments of the impact of earlier statutes "are entitled to significant weight."[10]

In reaching its overly broad reading of the statute, the district court rejected what it disparagingly characterized as the Comptroller's "literal" reading of the statute, preferring to rely on one opaque piece of post-enactment legislative history. 577 F. Supp. at 259, Pet. App. 25a-26a. This Court has recently cautioned, however, in a related context, that the banking statutes are to be read in accordance with their terms and that

[9] *See, e.g., Financial Institutions and the Nation's Economy: (FINE) Discussion Principles: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Banking, Currency and Housing Committee*, Part 1, 94th Cong., 1st Sess. & 2d Sess. 1245-1249 (1975); *id.*, Part 3 at 1834 (1976); *Foreign Bank Act of 1975: Hearing Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 154-56, 234, 370-72, 433, 509-10 (1976); *International Banking Act of 1976: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 162-64, 169-70, 258-59 (1976); *International Banking Act of 1977: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 301, 311-33, 473-74, 556, 576, 607-08 (1977); *International Banking Act of 1978: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 95th Cong., 2d Sess. 99, 144, 198-200 (1978); *International Banking Act of 1978: Report of the Senate Committee on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 8-11 (1978).

[10] *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *accord, e.g., Bell v. New Jersey*, 461 U.S. 773, 784-85 (1983); *Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 61-77 (1981); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 300 (1979); *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962).

policy decisions to alter those terms should be left to Congress. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 689 (1986). As this Court observed, matter extrinsic to the legislative debate, even when made a part of the formal record before Congress, "is not 'legislative history' in any meaningful sense of the term and cannot defeat the plain application of the words actually chosen by Congress to effectuate its will." *Id.* at 688.

Adopting the district court's sweeping definition of "branch" could have severe consequences for activities in which national banks have long engaged and would inevitably create confusion and uncertainty. If "branch" were defined to embrace any operation conducted by a national bank at its main office, it could bring within the definition of "branch" many activities now commonly conducted elsewhere, *e.g.*, loan production, trust account administration (which necessarily involves the purchase and sale of securities[11]), processing of installment loans, equipment leasing and credit card processing operations. This would throw into question the legal viability of hundreds of national bank offices which have not heretofore been considered branches. The district court's formulation, which would restrict all activities "aimed at attracting and servicing customers conveniently", substitutes for Congress's objective test an unjustifiably and unworkably vague rule which invites litigation. This Court should not accept the lower courts' invitation to scuttle the three-fold test that Congress has selected and the Comptroller and the courts have enforced for six decades.

B. *The Courts Below Ignored the Principle That Statutory Restrictions on Competition Are Not To Be Inferred Absent Explicit Congressional Command.*

While affirming the right of national banks to engage in the business of securities brokerage, the courts below adopted

[11] *See Investment Company Institute v. Clarke*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,463 (D. Conn. 1986), *aff'd*, No. 86-6033 (2d Cir. May 2, 1986).

an interpretation of the McFadden Act that has the inevitable and intended effect of significantly hampering bank brokerage operations in competing with non-bank securities brokerage firms. The anticompetitive effect of the decision was at least implicitly recognized by the district court. It found:

> "SIA has alleged that *its members' profits will suffer* if national banks are allowed to operate brokerage subsidiaries in competition with them. And it is obvious that the greater number of offices from which banks are allowed to conduct their brokerage business, *the greater will be the inroads the banks will be able to make* into the business of SIA's members." 577 F. Supp. at 258, Pet. App. 23a (emphasis supplied).

Inroads can be made into "the business of SIA's members" only by attracting customers with competitive prices and services. But the salutary function of competition in our economy is precisely that it affords choices to customers and thereby constrains profits by driving down prices and threatening the erosion of market shares.

In adopting an interpretation of § 7(f) of the McFadden Act that subjects competition to the handicap of locational constraints, the courts below utterly disregarded the fundamental national policy in favor of vigorous and unhampered competition. As Congress long ago established, preserving the rule of competition is the declared public policy of the United States. 15 U.S.C. §§ 1-7. This Court has stated:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise laid open to question, the policy

> unequivocally laid down by the Act is competition." *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4 (1958).

Clear recognition of that policy has given rise to rules of statutory construction and interpretation that were entirely ignored by the courts below. As this Court has held, statutory exceptions to the rule of competition must be both explicit and narrowly construed. *See United States v. National Ass'n of Securities Dealers, Inc.,* 422 U.S. 694, 719-20 (1975); *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 218 (1966); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51 & n.28 (1963).[12]

The courts below wholly disregarded this doctrine, finding in the McFadden Act competitive constraints neither expressed nor intended by Congress. Even if the relevant statutory language were more ambiguous than we believe it to be, it obviously does not manifest the requisite explicit intention to restrain competition of the type involved here. As we have shown above, nothing in the language of the Act suggests that locational restraints apply to offices, agencies or any other types of facility at which none of the three specifically designated types of transactions occurs. Since discount brokerage offices perform none of the enumerated functions, nor engage in activities even arguably akin to those functions, only an imaginative and unwarranted stretch of the statutory language can embrace them. Whether or not such an elastic approach to statutory construction would be appropriate in any circumstances, it is clearly impermissible when it collides with the explicit Congressional policy in favor of unhampered competition.

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[12] We fully recognize, as this Court stated with respect to the Glass-Steagall Act in *Investment Company Institute v. Camp,* 401 U.S. 617 (1971), that Congress has elected to sacrifice to other purposes competition in some areas. 401 U.S. at 630, 635-36. But exceptions to the rule of competition are not to read more broadly than required by the express language Congress adopted. *See Federal Maritime Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 733 (1973); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973).

The purpose of the McFadden Act was to facilitate competition among state and national banks and not to restrain competition between banks and brokerage firms. The Act sought to redress a competitive inequality by granting national banks the same branching privileges afforded to state banks by state law. *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *see* R. Westerfield, *Banking Principles and Practice*, 249-51 (rev. ed. 1928). Nothing in the Act suggests a purpose to provide non-bank brokerage firms with shelter from competition.

These considerations also evidence the soundness of the dissenting opinion on denial of rehearing en banc, 765 F.2d at 1197, Pet. App. 6a-9a, that SIA is not within the zone of interests protected by—and hence does not have standing under—the McFadden Act. While we do not doubt that SIA's members may in some sense be injured by more intense competition, such injury without more is insufficient to establish standing to sue. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976). By abandoning the zone of interest requirement, the decision below threatens to engulf the regulatory scheme established by the McFadden Act and implemented by the Comptroller in endless litigation at the behest of innumerable litigants seeking to fetter actual or potential competition from banks and bank subsidiaries.

The restriction of such competition as banks may provide in the area of discount brokerage services should not be countenanced absent express Congressional proscription. The branching provisions of the McFadden Act clearly do not contain such a proscription, and the language of the Act should not be strained to provide one.

CONCLUSION

The indeterminate redefinition of "branch" adopted by the courts below is inconsistent with the plain meaning and the legislative history of the McFadden Act and cannot be justified by either a post-enactment statement of Representative McFadden or the decisions cited by the courts below. For the reasons stated above, the decision of the court of appeals, insofar as it holds that discount brokerage offices are bank branches, should be reversed.

Respectfully submitted,

ROBERT S. RIFKIND
ELIZABETH S. STONG
RICHARD LIEBESKIND, JR.
One Chase Manhattan Plaza,
New York, N.Y. 10005

Attorneys for The New York Clearing House Association as Amicus Curiae

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza,
New York, N.Y. 10005

Of Counsel.

May 17, 1986

Nos. 85-971, 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,
v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,
v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF INDEPENDENT BANKERS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

ERWIN N. GRISWOLD
(Counsel of Record)
LEONARD J. RUBIN
MOLLIE A. MURPHY
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005
(202) 682-4000
Counsel for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether offices of national banks that offer discount brokerage services are "branches" within the meaning and intent of Section 7(f) of the McFadden Act, 12 U.S.C. 36(f), and therefore are subject to the state-law restrictions upon branching that are expressly incorporated in Section 7(c), 12 U.S.C. 36(c).

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BRIEF OF INDEPENDENT BANKERS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

The Independent Bankers Association of America ("IBAA") appears herein as *amicus curiae*, with the consent of all parties,[1] in support of respondent Securities Industry Association.

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[1] Letters indicating the consent of all parties to the filing of this brief have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

The IBAA is a non-profit Minnesota corporation, with headquarters in Washington, D.C., and offices in Sauk Centre, Minnesota, which represents more than 7,000 commercial banks, both national and state-chartered, in all 50 states and the District of Columbia. The members of the IBAA are interested in the principle that the individual states, under the McFadden Act, 12 U.S.C. § 36 (1976) (the "Act"), have the right to determine the structure of the banking industry within their borders. If petitioners are successful in asserting that the definition of "branch" is limited to only those national bank facilities offering one or more of the three services enumerated as examples in subsection (f) of the Act—*viz.*, "deposits are received, or checks paid, or money lent"—the Comptroller will be free to permit national banks to provide all other banking services at non-chartered offices without regard to the state-law restrictions on branching that are expressly incorporated by the Act. Such a result would violate the congressional policy of "competitive equality" by disrupting the existing competitive balance in branching between state and national banks and would displace the states from their congressionally-mandated role as decision-makers in determining the structure of banking operations within their respective borders.

In this brief, IBAA addresses only the issue of whether national bank facilities offering discount brokerage services are "branch" banks, an issue of immediate interest to the IBAA. IBAA has appeared as a party and as *amicus curiae* on numerous occasions in court actions and administrative proceedings relating to the preservation of the Act's policy of "competitive equality" between national and state banks in the area of branching.

INTRODUCTION AND SUMMARY OF ARGUMENT

This action arises from a challenge by Respondent Securities Industry Association ("SIA") to the Comptroller's approval of applications by two national banks to establish or purchase subsidiaries offering discount brokerage services. Union Planters National Bank of Memphis sought approval for its acquisition of Brenner Steed and Associates, Inc., a discount brokerage business. As set forth in its application, Union Planters proposed to offer discount brokerage services (through an operating subsidiary) at specified branch offices and affiliates within Tennessee, as well as at correspondent banks in Tennessee and six other states. Petitioner Security Pacific National Bank ("Security Pacific") proposed to establish a new operating subsidiary that would offer brokerage services at certain Security Pacific branch offices and, in the future, at non-branch offices located in California and other states. The Comptroller approved Security Pacific's application in a decision issued August 26, 1982; Union Planter's application was approved on September 30, 1982.[2]

In its Security Pacific decision, the Comptroller found that neither the prohibitions of the Glass-Steagall Act nor the branching restrictions of the McFadden Act precluded approval of the application. In his analysis of the McFadden Act, the Comptroller observed that the Act defines a branch as including "any branch bank . . . or any branch place of business . . . at which deposits are

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[2] *See* Decision of the Comptroller of the Currency on the Application of Security Pacific National Bank To Establish an Operating Subsidiary to be Known as Security Pacific Discount Brokerage Services, Inc. ("Comptroller's Decision") (Aug. 26, 1982), attached to the *Comptroller's Petition for cert.* (Nos. 85-971, 85-972) ("Comptroller's Pet.") as Appendix D ("Comptroller's Pet. App. D") at 30a-46a; Letter to Richard C. Raines, Senior Vice President, Union Planters National Bank of Memphis from James E. Brennen, Office of the Comptroller of the Currency. Comptroller's Pet. App. E at 47a.

received, or checks paid, or money lent" and concluded that, because the proposed brokerage facilities would perform none of these enumerated functions, the facilities were not "branches" within the meaning of the Act. Comptroller's Pet. App. D at 39a-43a.

Briefly considering the possibility that the facilities could, nonetheless, be deemed "branches," the Comptroller acknowledged that the Eighth Circuit had concluded that a national bank office providing only trust services (a non-enumerated function) was a "branch" because it offered banking services to the public away from the main office and branches of the bank. *St. Louis County National Bank* v. *Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (*"Mercantile Trust"*). However, the Comptroller summarily dismissed the Eighth Circuit's decision as "an overly broad reading of the statute". Comptroller's Pet. App. D at 43a.

The district court below flatly rejected the Comptroller's assertion that the definition of "branch" encompasses only those facilities at which the three services enumerated as examples in subsection (f) are offered. In the court's opinion, this "literal reading" of the statute was "contradicted" by the legislative history of the McFadden Act and by decisions of other courts. In particular, the court noted with approval the Eighth Circuit's *Mercantile Trust* decision. *Securities Industry Association* v. *Comptroller of the Currency*, 577 F. Supp. 252, 260 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir.), *reh'g denied en banc*, 765 F.2d 1196 (1985); Comptroller's Pet. App. C at 27a.

Applying the Eighth Circuit's analysis, the district court found that the provision of discount brokerage services was "clearly aimed at attracting and servicing customers conveniently." 577 F. Supp. at 260; Comptroller's Pet. App. C at 28a. On the basis of this finding and the court's holding that the provision of discount

brokerage services by a national bank is not prohibited by the Glass-Steagall Act, the court concluded that brokerage business is within the category of "general business" banks may transact only at their main office and at authorized branches. Provision of securities brokerage services was, therefore, subject to the locational limitations of 12 U.S.C. § 81 [3] and 12 U.S.C. § 36.[4]

On appeal to the Court of Appeals for the District of Columbia, the district court's decision was affirmed *per curiam*, "generally for the reasons stated in [the district court's] Memorandum Opinion." *Securities Industry Association* v. *Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985); Comptroller's Pet. App. A at 1a-3a. The Comptroller and Security Pacific filed timely petitions for *certiorari* with this court on December 9, 1985. On March 4, 1986, this Court granted *certiorari* and consolidated the cases for review. 106 S. Ct. 1259.

IBAA submits that the courts below correctly held that national bank facilities providing discount brokerage services are "branches" within the scope of the McFadden

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[3] Section 81 provides that a national bank may transact its "general business" *only* in the place "specified in its organization certificate" and in any branch "established or maintained by it in accordance with [12 U.S.C. § 36]." 12 U.S.C. § 81 (1982).

[4] The Court also dismissed the Comptroller's novel contention that the restrictions of the McFadden Act were applicable only to intrastate branching, stating:

> [This contention] ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the location of bank offices, which previously had allowed national banks only one central office. Never have any national banks been authorized under the National Bank Act to maintain offices outside their home state.

577 F. Supp. at 260; Comptroller's Pet. App. C at 28a. *See infra* 10-11 and note 10.

Act. Accordingly, a national bank may establish such facilities only in its home state and only at locations where competing state banks would be authorized under state law to establish comparable facilities. The Comptroller's assertion that the definition of "branch" applies *only* to bank facilities offering one or more of the three services enumerated as examples in the Act, is not supported by the language of the Act, its legislative history, or the many judicial interpretations of the Act. Indeed, as this Court has confirmed, Congress plainly intended the definition of "branch" to be expansively construed to ensure that Congress's principal concern for maintaining competitive equality between the state and national banking systems is not subverted. *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 134 (1969) ("*Plant City*").

This congressional interest in maintaining competitive equality is served only if a "branch" continues to include all national bank facilities providing authorized bank services to the public which would afford a competitive advantage over competing state banks not similarly authorized. The discount brokerage facilities at issue here clearly meet these requirements. The courts below found that the securities brokerage business is authorized as a recognized banking business under 12 U.S.C. § 24 (1982), and that national banks which offer these services at off-premises facilities will obtain a distinct competitive advantage over state banks not similarly authorized. National bank facilities at which discount brokerage services are offered must, therefore, be held to constitute "branches" subject to state restrictions on branching as established by the McFadden Act.

ARGUMENT

I. THE COURTS BELOW CORRECTLY INTERPRETED THE McFADDEN ACT

The McFadden Act provides that a national bank may establish and operate "branches" (i) within the city or town in which the bank is situated, but only if that operation is "expressly authorized to State banks by the law of the State in question", 12 U.S.C. § 36(c), *and* (ii) at any other point within the bank's home state, but only if such establishment and operation are

> authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively . . . and subject to the restrictions as to location imposed by the law of the State on State banks.

Id. For purposes of these restrictions,

> [t]he term "branch" as used in this section shall be held to *include* any branch bank, branch office, branch agency, additional office, or any place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f) (emphasis supplied).

The Act's sponsor, Representative McFadden, explained the intended scope of the "branch" definition in Section 36(f) as follows:

> *Any place* outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office, is a branch.* . . .

68 Cong. Rec. 5,816 (1927) (statement of Rep. McFadden) (emphasis supplied).[5] This Court has confirmed

[5] The Comptroller's attempt to denigrate the value of Representative McFadden's analysis of § 36(f) is flatly contradicted by the decisions of this Court in *Plant City*, 396 U.S. at 134 n.8, the Court

that the definition of "branch" must be applied in an expansive manner that preserves the congressional policy establishing competitive equality in branching between national and state banks. *Plant City*, 396 U.S. at 134. Accordingly, the definition of "branch" clearly was intended by Congress to include *any* national bank facility away from the main office where the bank transacts any banking business with the public which offers a competitive advantage over competing state banks that are not authorized to operate comparable facilities at comparable locations. As the courts below found, this interpretation is fully consistent with the historical context, the overall legislative history and the clear congressional policy underlying the Act.

A. The Legislative History Establishes That the Preservation of Competitive Equality Is the Fundamental Purpose of the McFadden Act

The McFadden Act resulted from Congress' recognition that, prior to 1927, a serious competitive imbalance had been created by the inability of national banks to branch and the explosive growth in the practice of branching by state banks. *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257-58 (1966) ("*Walker Bank*"). Prior to the Act's passage, national banks were authorized under the National Bank Act of 1864 to transact their "usual business" only in "an office or banking house located in the place specified in its organization certificate". National Bank Act of 1864, ch. 106, § 8, 13 Stat. 99, 102 (1865). As interpreted by the Attorney General, and subsequently by this Court, this statute limited national banks to one place of business, thereby prohibiting national banks from lawfully establishing

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of Appeals in *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 931-32 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("*IBAA* v. *Smith*"), and the Eighth Circuit in *Mercantile Trust*, 548 F.2d at 719, each of which viewed Representative McFadden's analysis as authoritative.

branches pursuant to their incidental power to carry on the banking business. *See First National Bank In St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640 (1924); *Lowry National Bank*, 29 Op. Att'y Gen. 81 (1911). As a result, efforts by national banks to compete in states permitting branching by state banks were substantially impeded.

Recognizing that this competitive imbalance threatened the continued existence of the national banking system,[6] legislation was introduced in Congress to equalize national and state branch banking. The merits of branch banking and the impact of congressional authorization of branching by national banks were sharply disputed. Some opponents of the legislation feared that any authorization of branching would lead to the destruction of unit banking and the rise of banking monopolies and absentee credit control. *See, e.g.*, 66 Cong. Rec. 1,624 (1925) (statement of Rep. Goldsborough); 66 Cong. Rec. 924 (1925) (statements of Rep. Frear); 66 Cong. Rec. 1,575 (1925) (statement of the American Bankers Association). Proponents of the bill acknowledged the potential dangers of branching, but argued that the crisis situation demanded relief. They emphasized the limited nature of the branching powers authorized by the proposed legislation, *i.e.*, it would permit only citywide branching and would enable national banks to meet the increasing needs of large metropolitan areas for convenient banking facilities. *See, e.g.*, H.R. Rep. No. 583, 68th Cong., 1st Sess. 1 (1924) (emergency situation); 66 Cong. Rec. 1,645, 1,767 (1925) (remarks of Rep. McFadden); 66 Cong. Rec. 1,775 (1925) (remarks of Rep. Watkins).

A legislative compromise was finally achieved in 1927, with the passage of the McFadden Act. Under the Act,

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[6] In his annual report of 1923, the Comptroller of the Currency stated that continued unlimited branching by state banks "will mean the eventual destruction of the national banking system." H.R. Doc. No. 90, 68th Cong., 1st Sess. 6 (1924), *quoted in Walker Bank*, 385 U.S. at 257.

national banks were permitted to establish branches only within the city in which they were located and only if competing state banks were expressly granted similar privileges under state law. In this fashion the Act restored the competitive balance between the national and state banking systems, while ensuring that states would control the degree to which branching was permitted. *See Walker Bank*, 385 U.S. at 257-58.

The Banking Act of 1933, ch. 89, 48 Stat. 162 (1933), amended the McFadden Act by extending the branching privileges of national banks. Again, however, the Act's primary goal of preserving competitive equality based upon state control over branching was reaffirmed. In this regard, it is noteworthy that the Comptroller and his supporters in Congress proposed legislation in 1932 that would have authorized national banks to branch, *without regard to state law*, at any location within their home state *and* at any point outside such state located within 50 miles of their home office.[7] This proposal, however, was strenuously opposed on the ground that it would lead to the destruction of the state banking system, and it was defeated.[8] As a result, the 1933 amendment of the McFadden Act provided that national banks could branch only "within the borders of the State in which they exist," [9] and, even there "only to the extent that the State laws permit branch banking." [10] Representative Luce, a

[7] S. 4412, 72d Cong., 1st Sess. § 19 (1932). *See* S. Rep. No. 584, 72d Cong., 1st Sess. 11, 16 (1932).

[8] *See e.g.*, S. Rep. No. 584, *supra* note 7, Part II, 3-4 (minority views); *Walker Bank*, 385 U.S. at 259; Wilmarth, *The Case for the Validity of State Regional Banking Laws*, 18 Loy. L.A.L. Rev. 1017, 1024-25 (1985).

[9] S. Rep. No. 77, 73d Cong., 1st Sess. 11 (1933). *See* Wilmarth, *supra* note 8, at 1025.

[10] *Walker Bank*, 385 U.S. at 259, *quoting* 76 Cong. Rec. 2511 (1933) (remarks of Sen. Glass). In light of this legislative history, the Comptroller's suggestion that the McFadden Act was not intended to prohibit interstate branching by national banks is plainly without foundation. *See also Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545, 2551 (1985) ("At the time of the Bank Holding Company Act [of 1956], interstate branch banking was already prohibited by the McFadden Act.").

member of the conference committee on the Banking Act of 1933, declared that the amendment to the McFadden Act would preserve the principle of competitive equality in branching:

> In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking' systems, a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches.

77 Cong. Rec. 5896 (1933), *quoted in Walker Bank*, 385 U.S. at 260.

The Comptroller contends that this legislative history indicates that Congress's primary concern when debating the Act was that authorization of branching would permit national banks to gain a monopoly over capital and credit. Therefore, he argues, the restrictions imposed on branching were intended to apply only to bank offices in which one or more of the three enumerated services would be offered, because monopoly control could be obtained only through these three banking services.

While the debates do reflect the concern of some members of Congress that branch banking would promote monopoly control, the complete legislative history plainly reveals that the *primary* purpose of the McFadden Act was to preserve competitive equality between national and state banks through the mechanism of state control over branching. Any subsidiary concerns regarding con-

centration were accommodated by limiting the scope of authorized branching for national banks to that permitted to state banks.

In *Plant City*, this Court affirmed that the McFadden Act "has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster 'competitive equality' ".[11] Similarly, in *IBAA* v. *Smith*, the D.C. Circuit, after reviewing the legislative history in detail, declared that the overriding purpose of the Act was to establish competitive equality through federal deference to state branching laws:

> Thus, the Act and its subsequent amendments restored competitive equality to the dual banking system by confining national banks to the branching policies of the individual states. This also eliminated discrimination between state and national banks in terms of ability to branch while maintaining the preeminence of state authority in the field. Control of the nature and extent of state and national bank branching was left to the states.

534 F.2d at 930-31.

B. The Definition of "Branch" Must Be Applied in Accordance With the Principle of Competitive Equality

In *Walker Bank* and *Plant City*, as well as in a long line of subsequent circuit court decisions,[12] the courts have applied a flexible definition of "branch" which fulfills the

[11] 396 U.S. at 131, *quoting Walker Bank*, 385 U.S. at 261.

[12] *E.g., Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (*"Fort Collins"*); *Illinois* v. *Continental Illinois National Bank and Trust Company of Chicago*, 536 F.2d 176, 178-79 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *IBAA* v. *Smith*, 534 F.2d at 931-32, 938, 942; *Mercantile Trust*, 548 F.2d at 717-19.

McFadden Act's purpose of establishing and maintaining competitive equality between national and state banks in the area of branching. The concept of competitive equality views competitive effect "from the standpoint of the bank customer",[13] and is not just one "consideration" in applying the branch banking laws; it is the "overriding policy" of the McFadden Act.[14]

Following that analytical approach, the courts below properly found that the offering of discount brokerage services by national banks, viewed in light of the policy of competitive equality, plainly fell within the scope of the "branch" definition in Section 36(f). *See* 577 F. Supp. at 260; Comptroller's Pet. App. C at 28a.

The congressional policy of competitive equality flatly contradicts the Comptroller's attempt to limit the "branch" definition only to facilities performing one or more of the three enumerated examples of branching activities. Indeed, as this Court has expressly recognized, the fulfillment of the Act's primary objective *requires* that the definition "must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank*." *Plant City*, 396 U.S. at 134.[15] Because the "branch" definition must be determined in light of this broad policy, any interpretation of that definition with respect to banking services must consider "all those aspects . . . that might give the bank an advantage in its competition for customers." *Id.* at 136-37.

[13] *IBAA* v. *Smith*, 534 F.2d at 943.

[14] *Driscoll* v. *Northwestern National Bank of St. Paul*, 484 F.2d 173, 175 (8th Cir. 1973).

[15] Significantly, in the footnote to its statement cautioning against a "restrictive" interpretation of the "branch" definition, this Court quoted Representative McFadden's explanation of the term "branch" which was relied upon by the district court below and is quoted *supra* on page 7. *See* 396 U.S. at 134 n.8.

As discussed more fully in Section II.-A., at pp. 18-21 below, securities brokerage is a recognized banking service and an effective tool in the competition between banks for bank customers. In the intense competition for customer deposits, particularly following the deregulation of interest rates which began in 1980 and was completed earlier this year, a bank's ability to assist customers in investing their funds is a major element in attracting and maintaining deposit and other customer relationships. The offering of discount brokerage by national banks therefore constitutes branch banking because it fits precisely within the broad interpretive parameters for application of the principle of competitive equality.

The Comptroller argues that only the three services specifically enumerated in Section 36(f) were intended to be included within the definition of "branch." The Comptroller's interpretation, however, is based upon a restrictive reading of section 36(f) which has been rejected by the courts below and is directly contrary to the substantial body of case law holding that the three banking services enumerated as examples in the Act are *not* the exclusive indicia of branch banking. This Court, for example, held in *Plant City* that the three listed services in section 36(f) are only those services that *"at the very least"* represent branching activities. 396 U.S. at 135 (emphasis supplied). This Court noted that "by the use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term." *Id.* Accordingly, the Court stated that the definition of "branch" *"may include more"* than only the three specified services. *Id.* (emphasis supplied).

Although purporting to be consistent with this broad interpretation of section 36(f), Brief for Federal Petitioner ("Compt. Br.") at 35, in fact, the Comptroller's restrictive reading is flatly contrary. Acceptance of the Comptroller's reading of the Act would mean that the Act's three specified examples of branch services constitute not only the *minimum* content of the term "branch" but the *maximum* as well—precisely the opposite of this Court's interpretation. Clearly, this Court *rejected* the concept that Congress intended a full enumeration of branch banking services in the Act, in favor of establishing a flexible standard of analysis to determine, on a case-by-case basis which—*not whether*—other banking services should be included within the definition of "branch".[16]

In *Mercantile Trust*, 548 F.2d at 718-20, relied on by the courts below, the Eighth Circuit held that a trust facility operated by a national bank in Missouri, at which customers were offered estate and trust services, was nonetheless a "branch" even though *none* of the services enumerated as examples in section 36(f) was offered at the facility. The court of appeals determined that (1) the services offered at the bank's trust facility were also routinely offered at the bank's main office; (2) the trust facility served to attract new customers; and (3) the facility offered increased convenience to the bank's customers and thereby gave the bank a competitive advantage over its competitors who were not permitted to offer the same off-premises services.

> In light of these factors, we hold that the establishment of such a permanent place of business as undertaken by Mercantile is a branch as contemplated by section 36(f). It should be emphasized that this holding is based on our interpretation of the lan-

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[16] 396 U.S. at 135-137. *Accord, IBAA* v. *Smith*, 534 F.2d at 931 ("Congress intended to include virtually all off-premises banking operations . . . within the Act's definition of "branch"); *Fort Collins*, 540 F.2d at 499 ("accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services."); *Mercantile Trust*, 548 F.2d at 719 ("the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking . . . . [E]ach case must be considered on its own facts to determine if a branch exists.").

guage of section 36(f) as explained by its own author's analysis, its construction given by other courts, and the purpose for its Congressional enactment.

548 F.2d at 719-20.

The foregoing cases confirm that the McFadden Act was adopted primarily to equalize competition between national and state banks in the conduct of the banking business through the establishment of additional bank facilities. Congress plainly did *not* intend to restrict this policy only to bank offices that offer at least one of the three enumerated services,[17] or only to the "traditional" types of bank offices.[18] Thus, *any* banking service offered to the public by a national bank at an off-premises bank facility which provides the bank a competitive advantage vis-a-vis state banks which are not authorized by state law to operate such a facility at the same location, was intended to be encompassed within the scope of the "branch" definition.

The Comptroller attempts to explain the Act's open-ended language by arguing that the use of the word "include" in section 36(f) was meant to refer *only* to other *locations* at which the enumerated services may be offered, not to other *services*. Compt. Br. at 28-29. However, this Court held in *Plant City* that the "branch" definition takes into account "*all* those aspects of" the proposed service which afford a competitive advantage over state banks, including *both* the service *and* the location at which the service is to be offered. 396 U.S. at 136-37 (emphasis supplied). Thus, if state banks either are not authorized under state law to provide similar banking *services* outside their main offices, or are not authorized to provide them at the same *locations* proposed by national banks, then the principle of competitive equality *requires* that national banks be permitted to offer the services off-

[17] *See* cases discussed *supra* note 16.

[18] *IBAA* v. *Smith*, 534 F.2d at 932.

premises only if, and to the same extent that, state banks may do so.

It is important to note that the conclusion of the courts below that discount brokerage offices *are* "branches" has *not* caused national banks to be *more* restricted than state banks in opening such offices. In states which *do* consider discount brokerage offices to be "branches", national banks are permitted to establish such offices to the same extent (and *only* to the same extent) that state banks may do so under state branching law. *See Plant City*, 396 U.S. at 130, 138. In states which do *not* consider discount brokerage offices to be "branches", and therefore do not subject such offices to state branching restrictions, it is nevertheless clear—as explained in *IBAA* v. *Smith*, 534 F.2d at 948-49 and n.104—that, under the principle of competitive equality, national banks *are* allowed to establish discount brokerage offices to the same extent that state banks may do so under state law.[19] Thus, the decisions below have preserved competitive equality in branching between national and state banks.

Petitioners complain that a national bank will not be permitted to establish discount brokerage offices *outside* its home state if such offices are deemed to be "branches".[20]

[19] The only restriction upon national banks in this situation would be that they must still comply with the federal branching regulations as to capitalization and Comptroller approval. *See IBAA* v. *Smith*, 534 F.2d at 949-50.

[20] Petitioners point out that such offices *can* be established across state lines if they are organized as bona fide *nonbanking* subsidiaries of a bank holding company. *See Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. 207 (1984); *Lewis* v. *B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980). Petitioners therefore assert that the national banks which are *not* subsidiaries of bank holding companies are disadvantaged with respect to those banks which are subsidiaries. The short answer to this complaint is that *all* banks may establish holding companies, and that neither the McFadden Act nor the Bank Holding Company Act was intended to establish "competitive equality" between non-holding company banks and holding company banks.

This prohibition on interstate branching, however, derives from the plain language and intent of the McFadden Act and is a matter for Congress—not the Comptroller or the courts—to remedy. *See supra* notes 7-10 and accompanying text; *Plant City*, 396 U.S. at 138. In addition, this situation does *not* create a practical competitive inequality between national banks and state banks, since the IBAA is not aware of any state statutes which permit state banks to operate discount brokerage offices or other branches across state lines.

II. THE COURTS BELOW PROPERLY APPLIED THE ACT TO THE OFFERING OF DISCOUNT BROKERAGE SERVICES BY NATIONAL BANKS

A. Securities Brokerage Is a Banking Service

Petitioners' argument that discount brokerage is a "nonbanking" function is inconsistent with petitioners' arguments below,[21] as well as the specific finding of this Court and other courts that national banks are empowered to provide this service as part of the banking business authorized by the National Bank Act.

National banks may exercise only those powers which are expressly granted to them or are incidental to their conduct of the business of banking. *First National Bank in St. Louis*, 263 U.S. at 656. The Comptroller and the courts below found that the right of national banks to provide discount brokerage services is based on their authority to engage in the limited securities activities specified in 12 U.S.C. § 24 (Seventh), and concluded that the provision of those services did not violate these statutory restrictions.[22] Thus, to the extent that the investment securities powers of national banks under the National Bank Act authorize the provision of securities brokerage services, those services are *banking*—not nonbanking— services. The Comptroller is quite wrong when he asserts that, in *Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. 207, this Court upheld the offering of discount brokerage services by bank holding company subsidiaries "because discount brokerage is a *nonbanking* activity that is 'closely related' to banking", and that "[t]here is thus little doubt that discount brokerage is not a traditional banking service". Compt. Br. at 41 (emphasis in original). In fact, this Court held exactly the *opposite*:

> [the Federal Reserve Board] found that the [discount brokerage] services were "operationally and functionally" very similar to the types of brokerage services that are generally provided by banks . . . .
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> * * *
>
> Banks have long arranged the purchase and sale of securities as an accommodation to their customers. Congress expressly endorsed this *traditional banking service* in 1933.

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[21] *See, e.g.*, Compt. Br. at 31, 33, 37; Comptroller's Pet. at 14; Comptroller's Pet. App. D at 32a-37a; Brief of Petitioner Security Pacific ("Sec. Pac. Br.") at 24.

[22] The right of banks to engage in limited investment securities activities was specifically acknowledged in a proviso added to section 5135 (now 12 U.S.C. § 24 (Seventh)) by Section 2(b) of the McFadden Act. In enacting this proviso, Congress recognized that banks had already been performing investment securities functions for a number of years pursuant to their "incidental corporate powers to conduct the banking business". H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926). Congress did not, therefore, propose the amendment to § 24 as a grant of new power, but rather as an affirmation of an existing banking practice. *Id.*; S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926) (provision "recognizes and affirms the existence of a type of business which national banks are now conducting under their incidental charter powers").

This explanation of the amendment clearly indicates Congress's belief that the securities business that national banks were then conducting was part of the banking business. This is specifically supported by the description of the amendment as "confirmation and regulation of *an existing banking service*,". H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926) (emphasis supplied).

Securities Industry Association v. *Board of Governors of the Federal Reserve System*, 468 U.S. at 214-215 (emphasis supplied).

Petitioners further contend that even if the definition of "branch" does include services other than the three examples specified in subsection (f), the expansive standard adopted by the lower courts would bring within that definition every operation undertaken by a bank, even "peripheral" or "nonbanking" functions. Again, petitioners are wrong. Application of the decisions below do not, and will not, include within the scope of the "branch" definition *every* service performed by national banks. Rather, the lower courts correctly limited their holding to authorized banking services that, when provided to the public, afford national banks a competitive advantage over competing state banks not authorized to provide such services at the same locations. The decisions of the courts below accurately reflect the nature of brokerage services as an authorized banking service, and accord appropriate weight to the statutory goal of maintaining competitive equality between the state and national banking systems.

Other services performed by national banks (*e.g.*, "consulting services to other banks, business records maintenance for customers, check verification services for merchants, installation of electronic credit card verification terminals in stores, audit services for other banks and other customers, data processing services, and financial and investment consulting"), Sec. Pac. Br. at 30-31, are not *automatically* swept into the "branch" definition by the decision in this case. The decision below simply maintains the present statutory framework and policy of competitive equality regarding all off-premises services by national banks. These, or other banking services, are branch banking services only if, when judged on a case-by-case basis in light of the specific facts, they fit within the proper scope of the definition of "branch"—namely,

that such services are authorized banking services that, when provided to the public,[23] afford national banks a competitive advantage over competing state banks which are not authorized to provide such services at the same locations.

B. The Comptroller's Interpretation of the Act is Not Entitled to Judicial Deference

Petitioners argue that the Comptroller's determination regarding the applicability of the Act to securities brokerage services is entitled to deference and should be upheld because it gave effect to congressional intent as expressed in the language of section 36(f), and because it was based on a permissible construction of the statute, *i.e.*, it was a reasonable interpretation. In this case, however, no deference is appropriate because the Comptroller's position is plainly contrary to the intent of the McFadden Act.

Although courts may grant deference to an agency's construction of the statute it administers, courts are not bound to do so. As Professor Davis has observed:

> The law is not that courts use a reasonableness test in reviewing administrative determinations of questions of law, and the law is not that courts substitute judgment on such determinations; the law is

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[23] For example, banking services provided by national banks *exclusively to other depository institutions* would *not* fall within the "branch" definition as applied by the courts, because such services would not be offered to the public and therefore would not provide the type of competitive advantage proscribed by the McFadden Act. In this regard, it is noteworthy that the Bank Service Corporation Act, 12 U.S.C.A. §§ 1861-67 (West Supp. 1986), provides that a national bank or FDIC-insured state bank may invest in a bank service corporation which provides services at *any* location if such services are offered *only* to depository institutions. However, services offered to *other* persons may be performed *only* at locations permitted by the McFadden Act and state branching laws. *See* 12 U.S.C. §§ 1863 and 1864(c) and (d).

that courts have discretionary power either to use a reasonableness test or to substitute judgment.

5 K. Davis, Administrative Law Treatise § 29:16 (2d ed. 1984).

Professor Davis further notes that, in practice, this Court has frequently disregarded an agency's determination and substituted its own judgment for that of the agency. "Cases in which the Supreme Court substitutes judgment are quite numerous—far more numerous than deference cases. The Court substitutes judgment in some cases even when the question of interpretation involves policymaking within the agency's specialized area." *Id.*[24]

It has been demonstrated above that the Comptroller's determination is contrary to clear congressional intent in the McFadden Act. In such a situation, the Comptroller's interpretation is not entitled to any deference.

> Deference is not to be a device that emasculates the significance of judicial review . . . . A reviewing court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.[25]

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[24] For example, in *Dirks* v. *SEC*, 463 U.S. 646 (1983), this Court reversed the determination made by the Securities and Exchange Commission that Dirks violated the antifraud provisions of the federal securities law, including § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. This Court conducted its own analysis of the elements necessary to establish a violation of Rule 10b-5, noting that the SEC's position differed little from the view that was rejected by the Court in an earlier case as inconsistent with congressional intent.

[25] *Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. at 142-43, *quoting Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31 (1981). *Accord, Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 627-28 (1971); *First Union Bank and Trust Company* v. *Heimann*, 600 F.2d 91, 99 (7th Cir. 1979); *IBAA* v. *Smith*, 534 F.2d at 935.

In this case, this Court's previous opinions establish that the Comptroller's interpretation of the "branch" definition is inconsistent with clearly expressed congressional intent. In *Walker Bank* and *Plant City*, the Court thoroughly reviewed both the language and the congressional intent of the McFadden Act, and concluded that "[t]he policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system", *Plant City*, 396 U.S. at 134, and that "[t]he congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency." *Id.* at 138. The Court accordingly refused to give the "branch" definition a "restrictive meaning which would frustrate the congressional intent . . . found to be plain in *Walker Bank*." *Id.* at 135.

This interpretative standard has been followed by the courts of appeal in consistently *rejecting* the Comptroller's restrictive interpretation of the definition of "branch" in the Act, as flatly contrary to congressional intent.[26] The Comptroller's interpretation in this case is no different than those repeatedly rejected by the courts and thus should be accorded no deference.

CONCLUSION

The courts below properly held that off-premises national bank facilities offering discount brokerage services are "branches" within the meaning and intent of the McFadden Act, and therefore may not be established unless competing state banks are authorized under state law to operate similar facilities at the same locations. The legislative history and judicial interpretations of the Act make it clear that Congress intended the "branch"

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[26] *See, e.g.*, cases cited *supra* notes 12 and 16.

definition to include not only facilities performing the three services specifically enumerated in subsection (f) of the Act, but also all other lawful banking services offered to the public that provide national banks a competitive advantage over state banks not similarly authorized. Discount brokerage services are authorized banking services under the National Bank Act, provide a potential competitive advantage to national banks, and therefore should be subjected to the geographic restrictions contained in the McFadden Act.

For the foregoing reasons, the decision below on the merits of the McFadden Act issue should be affirmed.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)
LEONARD J. RUBIN
MOLLIE A. MURPHY
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005
(202) 682-4000
Counsel for Amicus Curiae

July, 1986

(12) (13)

Nos. 85-971 and 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BRANCH BANKING AND TRUST COMPANY, ET AL., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

JOHN J. JORDAN, JR.
Counsel of Record
HENRY W. JONES, JR.
Jordan, Price, Wall, Gray & Jones
1414 Branch Banking & Trust Building
P.O. Box 709
Raleigh, North Carolina 27602
(919) 828-2501

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
(919) 962-4120

Counsel for Amici Curiae

July 23, 1986

CASELLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

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BRIEF OF BRANCH BANKING AND TRUST COMPANY, ET AL., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

This *amici curiae* brief is filed with the consent of the parties in Nos. 85-971 and 85-972.[1] The brief supports the respondent in these two consolidated cases.

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[1]The originals of the letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The *amici* on whose behalf this brief is filed are six commercial banks operating in North Carolina: (1) Branch Banking and Trust Company; (2) First Union National Bank; (3) NCNB National Bank of North Carolina; (4) The Planters National Bank & Trust Company; (5) United Carolina Bank; and (6) Wachovia Bank and Trust Co., N.A. These six *amici* are the six petitioners in No. 86-76, *Branch Banking and Trust Company, et al.* v. *National Credit Union Administration Board, et al.* The *amici* filed their petition for writ of certiorari on July 21, 1986. It is presently pending before the Court, and will likely be held until the Court resolves the instant consolidated cases. The petition seeks review of the Fourth Circuit's ruling in *Branch Bank and Trust Company, et al.* v. *National Credit Union Administration Board, et al.*, 786 F.2d 621 (4th Cir. 1986).[2]

The filing of this *amici* brief is motivated by the fact that the Fourth Circuit's opinion in the *Branch Banking* case raises substantially the same competitor standing problem, under the "zone of interests" test, as involved in Nos. 85-971 and 85-972. Indeed, as the *Branch Banking* petition points out, the Fourth Circuit's use of the test to reject competitor standing conflicts with the District of Columbia Circuit's use of the test to confer competitor standing on the respondent association in this proceeding. The *amici* thus have a direct concern with the debate before this Court as to the proper meaning and application of the "zone of interests" test.

The *amici* are not here concerned with the merits of the question before the Court as to whether national bank of-

[2]The caption of the Fourth Circuit's opinion, as reported in 786 F.2d 621, incorrectly refers to "Branch Bank and Trust Company." The correct name is "Branch Banking and Trust Company."

fices offering only discount brokerage services are "branches" within the meaning of Section 7(f) of the McFadden Act, 12 U.S.C. § 36(f). Their only concern is with the standing of a competitor, like the respondent association, to protest an arguably wrong interpretation of a federal statute regulating the competing interests, i.e., the national banks. It is the standing of the respondent association to raise that question that links this case to the *Branch Banking* case. Like the respondent association, the *amici* banks seek standing to raise such a question in their capacity as competitors of the regulated competing interests, i.e., federal credit unions. Like the respondent, the *amici* have been competitively injured as the result of an arguably erroneous statutory interpretation. And like the respondent, the *amici* argue that they fall precisely within the narrow and intended scope of the "zone of interests" standing test, a formula originally designed by this Court to test standing only in the competitor context. *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970).

In rejecting the standing arguments of *amici* in *Branch Banking*, the Fourth Circuit developed a somewhat more sophisticated and in-depth analysis of the problem than have other lower courts, including the District of Columbia Circuit *per curiam* ruling here under review. *Amici* believe that this brief, which reflects and critiques the Fourth Circuit's viewpoint, will be of some assistance to this Court in resolving this difficult and recurring problem.[3]

[3]The Solicitor General represents the petitioner Clarke in No. 85-971. His brief on the merits (see pp. 15, 18, 24) makes use of the *Branch Banking* rationale of the Fourth Cirucit. The Solicitor General also represents the federal respondents in the *Branch Banking* petition for writ of certiorari.

SUMMARY OF ARGUMENT

This case involves important questions as to the meaning and application of the prudential "zone of interests" standing test. The test originated with this Court's decision in *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). As there stated, the test is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Particular note should be made of the use and placement of the word "arguably" in this formulation of the test.

It bears emphasis at the outset that the zone of interests test was born of this Court's desire to enhance rather than diminish competitor standing. At least three considerations mentioned in the *Data Processing* opinion testify to that desire. First, since the case had been instituted under the Administrative Procedure Act, the *Data Processing* opinion placed heavy reliance on the trend under that Act "toward enlargement of the class of people who may protest administrative action," including enlargement of the statutory category of aggrieved "persons." Second, the Court likened aggrieved competitors to "reliable" private attorneys general to litigate such public issues as unlawful competition. Third, *Data Processing* made it quite explicit that it designed the zone test in order to liberalize and expand the pre-existing "legal interest" test for competitor standing. See, e.g., *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 137-138 (1939), holding that a competitor had standing only if possessed of a legal right or interest, such as one founded on a statute.

Much of the difficulty and confusion among the lower courts about the zone test stems from a seeming inability

to distinguish between the narrow "legal interest" test and the more liberal "arguably within the zone of interests" test. Such confusion is also evident in the briefs of the petitioners in this case. For the most part, the arguments in those briefs relate to the viability and justification of the "legal interest" test, which remains a part of but is not the dominant theme of the *Data Processing* "zone of interests" test. Thus the standing problem in this case is not whether competitors have standing by virtue of possessing some "legal interest" within the statutory zone of interests, but whether competitors who assert an interest in being free from unlawful competition by regulated businesses are "arguably" within the statutory zone of interests.

A close analysis of the *Data Processing* zone test reveals two distinct strands or prongs. The first strand incorporates the old "legal interest" test, and asks the question whether the aggrieved competitor is "clearly" within the protected or regulated zone of interests. An application of this "legal interest" prong is found in *Barlow* v. *Collins*, 397 U.S. 159, 164 (1970), decided the same day as *Data Processing*. After an intense inquiry into the relevant statute and its legislative history, *Barlow* found that the complainants were "clearly" within the statutory zone because Congress intended that their interests be protected. But, to repeat, this "legal interest" strand, this *Barlow* precedent, is not in issue before the Court in this case.

What is at issue is the newer and broader strand of the *Data Processing* zone test, epitomized by the *Data Processing* case itself. That aspect of the test requires that the competitor's interest be only "arguably" — not necessarily "clearly" — within the statutory zone. In applying that standard to the facts of the case, *Data Processing* carefully eschewed any substantial reliance on legislative history or

intent. By reference to the Administrative Procedure Act, the Court felt that the only pertinent inquiry was to discover if Congress had sought to preclude judicial review of the challenged administrative action. Having found no preclusion, the Court proceeded to hold that the aggrieved competitors, having asserted a right to be free from unlawful competition, were "arguably" within the zone of protected interests, from which the competitors' injuries had emanated. Hence the competitors had standing to challenge the administrative order that had caused the competitive injuries.

Stated differently, *Data Processing* holds that when a statute authorizes a regulated industry to engage in certain but limited marketplace activities, a statutory zone of competitive interests has been created. As long as the regulated or protected interests operate and compete within the parameters of the authorized zone, any competitive injuries received by unregulated competitors are considered *damnum absque injuria*. But if an administrative agency orders or permits the regulated interests to operate outside the defined zone, the administrative action is not only unlawful but it causes the resulting competition to be unlawful. The unregulated competitor's complaint that there has been an invasion of the right to be free from unlawful competition is enough to bring the competitor "arguably" into the statutory zone of interests and to give standing to attack the administrative action. It cannot be assumed that Congress intended to authorize unlawful competition or to permit illegal administrative action.

To permit competitor standing under the second and dominant prong of the *Data Processing* test does not implicate or violate any aspect of the separation of powers doctrine. Indeed, judicial review of unlawful administrative action is quite consistent with that doctrine, as well as with our theory of checks and balances.

ARGUMENT

This case, like the pending petition for certiorari in the *Branch Banking* case, involves important questions as to the meaning and application of the prudential "zone of interests" standing test. What is the purpose, the *raison d'etre*, of the test? Is it designed to close the doors of the federal courts to all aggrieved competitors who are not expressly or impliedly among the beneficiaries of the statutory scheme in question? Or is the purpose to confer standing on competitors who suffer from "arguably" unlawful competition traceable to administrative action in excess of statutory authority? And what is the relationship between the "arguably within the zone" test and the earlier "legal interest" test for standing?

These are not easy questions. The answers supplied by the briefs of the two petitioners are either non-existent or seriously flawed, and seem inconsistent with what this Court has said with respect to the zone test A basic reexamination of the test is in order.

Such a reexamination must start with a restatement of the zone test, as set forth by this Court in *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). Note should be made of the presence and position of the word "arguably," particularly since the word is omitted from nearly all the references to the test in the briefs of the petitioners.[4] In context and in full, the *Data Processing* zone formula reads:

[4]Thus in referring to the *Data Processing* formulation of the test, the Solicitor General's brief (at 13-14) omits the word "arguably" by quoting from a brief reference to the zone test in *Valley Forge Chris-*

The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1964 ed., Supp. IV) . . . . We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners [the competitors] rely here. Certainly he who is "likely to be financially" injured, *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case. [397 U.S. at 153-154].

1. The zone test is designed to enhance rather than diminish competitor standing.

A fair reading of the *Data Processing* opinion indicates that the "arguably within the zone" test was created primarily to promote competitor standing, not to discourage it. That is evident from at least three considerations mentioned in *Data Processing:*

(a) In the passage quoted above, the Court clearly

tian College v. *Americans United*, 454 U.S. 464, 475 (1982). *Valley Forge* referred to the zone test as a requirement "that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question' " (quoting from *Data Processing*). A similar reference to the zone test, omitting the word "arguably," is found in *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). The reason for omitting the word is not clear, although the zone test was not in issue in either *Valley Forge* or *Allen*.

equated an aggrieved competitor with a person "aggrieved by agency action" within the meaning of the Administrative Procedure Act. As the Court observed two paragraphs later (at 154), the whole trend under that Act "is toward enlargement of the class of people who may protest administrative action [and] [t]he whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend." To the same effect, see *Arnold Tours* v. *Camp*, 400 U.S. 45, 46 (1970).

(b) The Court also likened an aggrieved competitor, in the passage quoted above, to "a reliable private attorney general to litigate the issues of the public interest," such as the statutory problem in the instant case. A private attorney general is not ordinarily among the persons that Congress intends to benefit or regulate when it creates a statutory scheme of regulation.

(c) As the *Data Processing* opinion explains, 397 U.S. at 152-153, the "arguably within the zone" test was deliberately crafted to liberalize and expand the earlier "legal interest" test for competitor standing. Prior decisions of the Court had limited competitor standing to those who could claim some invasion of a legal right or interest. *Tennessee Power Co.* v. *TVA*. 306 U.S. 118, 137-138 (1939), had defined a competitor's legal right or interest as "one of property, one arising out of a contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." See also *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 4798 (1938) ("violation of a legal right"); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940) ("invasion of recognized legal rights").[5]

[5]As Professor Wright has written, "Such an approach is demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected." C. Wright, *The Law of Federal Courts* 65-66 (4th ed. 1983).

Thus, by broadening competitor standing beyond the narrow confines of the "legal interest" concept, *Data Processing* means that competitors may have standing even when the asserted competitive interest is not "one founded on a statute which confers a [competitive] privilege" or is not one arising out of property, contract or tort law.

Data Processing and its more generous view of competitor standing stand in sharp contrast to the arguments advanced by the petitioners in this case. Their contention, which has been adopted by some lower courts, is that a court, in applying the *Data Processing* zone test, "must discern whether the interest asserted by a party [a competitor] in the particular instance is one intended by Congress to be protected or regulated by the statute under which suit is brought." *Control Data Corp.* v. *Baldrige*, 655 F.2d 283, 293-294 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981). The argument then proceeds to an intense search of legislative history to discover whether Congress really did intend to regulate or protect the competitive interest being advanced by the aggrieved competitor. Only if one concludes that the statute does protect the competitors' interests does one say that those interests fall within the "zone of interests" protected by the statute, thereby conferring standing on the competitors.

Such an argument, such an interpretation of the *Data Processing* zone test, is unacceptable. It takes all the liberalization out of the test for determining competitor standing. By asserting that we must discern whether Congress did intend to protect or regulate the interest asserted by the competitor, this contention becomes nothing more than a resurrection of the abandoned "legal interest" limitation on standing. It is difficult to discern any meaningful difference between the "legal interest" requirement that the competitor's interest be "founded on a statute

which confers [such] a privilege" and "zone of interests" requirement that the competitor's interest be "one intended by Congress to be protected or regulated by the statute." The "arguably within the zone" test would thus revert to the more limited "legal interest" test.

Surely the *Data Processing* concept of competitor standing must have more meaning than the legal interest concept. It must be more than an exclusionary rule. It must have been designed to confer standing on some competitors who could not be said to have some legal interest or benefit founded on the statute in question. And so we turn to an examination of the broader aspects of the "zone of interests" test.

2. The zone test confers standing on competitors whose interest in being free from unlawful competition is "arguably" within a statutory "zone of interests."

Much of the confusion surrounding the zone test dissipates upon a careful reading of the *Data Processing* formulation. The precise wording of the test, which emphasizes the word "arguably," bears repetition at this point. In *Data Processing* language, the test is "whether the [competitive] interest sought to be protected by the complainant [the competitor] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[6] 397 U.S. at 153.

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[6]The *Data Processing* zone test has been applied only once by this Court in respect to a constitutionally protected zone. In *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320 n. 3 (1977), the Court held that stock exchanges asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business are "arguably within the zone of interests to be protected" by the Commerce Clause.

To begin with, this test is satisfied if the competitor can show, by reference to statutory langauge or intent, that competitive interests are "clearly" within the zone of interests protected or regulated by the relevant statute. But the test is not limited to those who can make such a "clear" showing. The test is also satisfied if the competitor's interest is only "arguably" within the zone of statutory interests. In other words, the *Data Processing* standing test can be met in either of two ways, each of which calls for a different analysis.

(a) The decision of this Court in *Barlow* v. *Collins,* 397 U.S. 159, 164 (1970), announced simultaneously with *Data Processing,* illustrates how the zone test can be satisfied by a showing that the complainant's interests "are clearly within the zone of interests" protected by the relevant statute. The interests of the complaining tenant farmers in *Barlow* were found to fall "clearly" within the statutory zone because "[i]mplicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of the tenant farmers . . . [and] the relevant statutes expressly enjoin the Secretary to do so." *Id.*

There are several lessons to be drawn from the *Barlow* application of the *Data Processing* test. First, the clarity with which an interest may be said to fall within the statutory zone becomes apparent only after an intensive inquiry into the statutory language and the legislative history — all designed to determine if Congress did indeed intend to protect or regulate the asserted competitive interest. Second, once the inquiry makes clear that Congress did intend to protect such an interest, the competitor has actually asserted a legal right or interest "founded on a statute which confers a privilege," *Tennessee Power Co.* v. *TVA,* 306 U.S. 118, 137-138 (1939). And the competitor would

then have satisfied the old "legal interest" standing test, which shows that the new zone test incorporates rather than abolishes the earlier test. Third, *Barlow* indicates that when the competitor's interest has been shown to fall "clearly" within the zone it becomes unnecessary to inquire whether that interest "arguably" falls within the zone.

(b) *Data Processing* itself illustrates the second strand of the zone test, whereby the competitor's interest need only be "arguably" within the statutory zone of interests. In that case, companies that offered data processing services to the general business community were held to have standing to seek judicial review of a ruling by the Comptroller of the Currency that national banks could make data processing services available to other banks and to bank customers. The statute that created the relevant "zone of interests" was § 4 of the Bank Service Corporation Act of 1962. That section provided that national banks may not "engage in any activity other than the performance of bank services for banks." Nothing was said about authorizing national banks to compete in offering any kind of nonbank services. Yet the Court without hesitation concluded that the interests of the data processing competitors were "arguably" within the "zone of interests" to be protected or regulated by § 4 of the Bank Service Corporation Act.[7]

[7] In only two other cases has this Court applied the "arguably" test in the context of competitors. In *Arnold Tours* v. *Camp,* 400 U.S. 45 (1970), travel agents serving the general public were held to have standing, under the zone test, to challenge an administrative ruling allowing national banks to provide travel services for their customers. In *Investment Co. Institute* v. *Camp,* 401 U.S. 617 (1971), open-end investment companies were held to have standing, under the "arguably" test, to challenge an administrative ruling authorizing national banks to establish and operate collective investment funds, in competition with the investment companies.

What are the lessons to be drawn from this application of the "arguably within the zone of interests" strand of standing requirements? First, the *Data Processing* opinion carefully eschews any intensive inquiry into legislative history or congressional intent in defining the zone of "arguable" interests. To do so, said the Court, would "implicate the merits." 397 U.S. at 156. Moreover, such an implication was precisely what made the "legal interest" test so limited in usefulness. *Id.*, at 153.[8] Second, *Data Processing* teaches that, in cases brought pursuant to the Administrative Procedure Act, the only pertinent inquiry into the scope and intent of the relevant statutes is to discover if Congress "sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under these statutes." *Id.*, at 157. In *Data Processing,* the Court concluded from its survey of the relevant statutes that the "competitors of national banks which are engaging in data processing services, are within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action.' " *Id.*

The final lesson to be drawn from *Data Processing* concerns the "argument" that brings a competitor's interest "arguably" within the statutory zone, especially when the statute is silent on the matter. The clearest answer is found in a subsequent decision, *Investment Co. Institute* v. *Camp,* 401 U.S. 617, 620 (1971). The Court there summarized the *Data Processing* decision as a holding "that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury . . . [and] that whether Congress had indeed

[8] "In *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition." *Arnold Tours,* 400 U.S. at 46.

prohibited such competition was a question for the merits" *Id.*

In other words, when a statute authorizes a regulated business to engage in certain marketplace activities, a statutory zone of competition has been legislatively created. An unregulated competitor of such a regulated business has no right to complain about the legitimate and authorized competition emanating from that statutory zone; any injury is *damnum absque injuria.* But unlawful competition by the regulated businesses makes the unregulated competitor "significantly involved in activities affected by those [within the zone] who are regulated." C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure,* Vol. 13, § 3531.7, p. 512, n.16 (1984). The competitor can then assert a "right to be free from unlawful competition."[9] and therefore can challenge the legality of some administrative ruling that unlawfully expands the competitive zone, thereby causing competitive injury.

The challenger's interest in being free from unlawful competition by those within the protected or regulated zone "arguably" has the effect of thrusting the competitor's interest into the zonal melee. And if the competitor alleges a *substantial* claim of injury from such unlawful competition, the competitor has standing to argue the merits of the legality of the administrative ruling. This is what is meant by the *Data Processing* formula

[9] *Chicago* v. *Atchison, T. & S.F.R. Co.,* 357 U.S. 77, 83 (1958), a case approvingly cited in *Data Processing,* 397 U.S. at 154-155. In the *Chicago* case, a long-established transfer company was held to have standing to challenge the failure of a new and competing transfer company to obtain a certificate of necessity as required by a new city ordinance. The challenger's standing was said to arise from an actual controversy in which it "has a direct and substantial personal interest in the outcome." *Id.*, at 83.

that the competitor be "arguably within the zone of interests." In terms of the *Data Processing* facts, it was thus "arguable" that the Comptroller's ruling was so erroneous, so contrary to the legislative intent, that Congress could be said to have "arguably legislated against the [unlawful] competition [by the national banks] that the petitioners sought to challenge." *Investment Co. Institute, supra,* at 620.[10]

The arguability prong of the zone test comes back to the simple proposition that "palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." *Sierra Club* v. *Morton,* 405 U.S. 727, 733-734 (1972). The only uniqueness here is that the injured party is a competitor, and the injury is a competitive one. Prior to *Data Processing,* such an aggrieved competitor could rarely find standing to challenge agency action under the strictures of the "legal interest" test. *Data Processing* broke the shackles of that test. No reason is apparent for putting those shackles back on competitors. To do so would effectively preclude them from showing that they are victims of unlawful competition and from obtaining judicial review of arguably unlawful administrative action.

[10]The facts in the *Branch Banking* case are even more compelling than those in *Data Processing.* The statute involved in *Branch Banking,* the Federal Credit Union Act, specifically provides that federal credit union membership "shall be limited" to groups having "a common bond of occupation or association." The federal adminstrator granted a charter to a group allegedly lacking such a common bond. Such an improper charter grant rendered unlawful the credit union's ensuing competition with the *amici* banks. Under *Data Processing* analysis, the banks were "arguably" injected into the statutory zone and thus should have standing to challenge the grant of the charter.

3. Application of the Data Processing zone test to competitors is fully consistent with the separation of powers doctrine.

Without distinguishing between the two prongs of the zone of interests test — the "clearly" and the "arguably" prongs — the petitioners in this proceeding, like some of the lower courts, assert that the zone test "serves largely to safeguard separation of powers principles, by 'secur[ing] the benefits of a statutory program for the groups that Congress intended to benefit.' *Leaf Tobacco Exporters Ass'n* v. *Block,* 749 F.2d 1106, 1111 (4th Cir. 1984)." Brief for the Federal Petitioner, p. 15 (No. 85-971). Reference is also made, *id.,* to the Fourth Circuit's additional comment in the *Branch Banking* case, 786 F.2d at 622-623, that because "it is primarily the province of Congress to consider and weigh the interests of those potentially affected by legislation and subsequent administrative action," application of the zone test ensures that persons consciously excluded from the administrative process will not be able to manipulate the statutory scheme to achieve purposes outside the contemplation of Congress.

Such comments miss the mark. They are directed at a standing problem that is not before the Court. As the *Data Processing* opinion said with emphasis: "The present is a *competitor's* suit." 397 U.S. at 152. It is not a suit about securing the benefits of a statutory program for groups that Congress did or did not intend to benefit. Nor is it a suit about conferring standing on persons or competitors who have been consciously excluded from a federal program or the administrative process. The competitors we are talking about are not trying to redo the legislative battle or to manipulate the courts into granting protection of an interest that Congress deliberately withheld. In short, we are not concerned here with a competitive interest that is "clearly" outside the statutory zone of interests, a situa-

tion where a competitor may lack standing under the "legal interest" prong of the zone test. If that were the case, the sentiments expressed by petitioners might be applicable.

What this case does involve is the second or "arguably" prong of the zone test, the prong that petitioners do not even acknowledge, let alone address. That is the prong that was applied in *Data Processing* and in the lower courts in the instant situation. It involves the situation where the competitor's claim of a right to be free from unlawful competition "arguably" comes within the zone of interests. It is a situation where those who are regulated have been authorized, by an allegedly erroneous and unlawful administrative ruling, to compete, to the detriment of competitors, outside the legitimate bounds of the statute. All that those competitors seek is judicial review of the erroneous administrative ruling, a ruling that concededly caused their competitive injury.

By no measure can it be said that allowing such an aggrieved competitor to challenge the administrative ruling upsets the statutory pattern or disrupts the separation of powers doctrine. The "arguably" prong of the zone test, like all other prudential limitations on standing, has a close relationship to the policies reflected in the Article III case or controversy requirement; and that requirement is an integral part of the separation of powers doctrine. But it is equally clear that the separation doctrine contemplates that the judiciary, as a separate branch, will allow such suits as are necessary to check and balance excessive or illegal action by either of the other two branches. That is the only separation of powers consideration in this case, a consideration too obvious to belabor.

Nor need there be fear that to reaffirm the *Data Processing* "arguably" test will result in encouraging frivolous

lawsuits or in opening the federal court doors to literally thousands of injured competitors. As Circuit Judge Tamm once said, "[t]he spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue." *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859, 872 (D.C. Cir. 1970). No one has claimed or could claim that the *Data Processing* decision in 1970 has resulted in an avalanche of competitor suits claiming interests that are arguably within the zone of statutory interests.

CONCLUSION

For these various reasons, the judgment of the Court of Appeals for the District of Columbia Circuit respecting the application of the "zone of interests" standing test should be affirmed. *Amici* express no opinion on the other issues incorporated in that judgment.

Respectfully submitted,

JOHN J. JORDAN, JR.
Counsel of Record
HENRY W. JONES, JR.
Jordan, Price, Wall, Gray & Jones
1414 Branch Banking & Trust Building
P.O. Box 709
Raleigh, North Carolina 27602
(919) 828-2501

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
(919) 962-4120

Counsel for Amici Curiae

July 23, 1986